RECORD, CASE No. 13,812.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 212.

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

E. R. TAGGART.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED OCTOBER 18, 1889.

tracts for special rates shall be open to and allowed all persons, companies and corporations alike at the same rate per ton per mile, upon like conditions and under similar circumstances, except in special cases designed to promote the development of the resources of this state, when the approval of said commissioner shall be obtained in writing." * * *

The plaintiffs in the court below allege in their amended complaint that the discriminations complained of were made "without obtaining the approval of said railroad commissioner, in writing or otherwise." (Printed record, page 11.) This is not denied.

The following authorities will throw additional light on the subject of discrimination:

Railroad Company vs. Northwestern Fuel Co., 31 Federal Reporter, 652.

Seafield vs. Railroad Co., 43 Ohio State, 571.

McDuffee vs. Railroad Co., 52 New Hampshire, 430.

Railroad Co. vs. People, 67 Illinois, 11.

II.

The second defense of the Union Pacific Railway Company (page 15, printed record) was clearly insufficient. The agreement was contrary to public policy. (See authorities above cited.) Furthermore, it was wholly outside of and in conflict with the company's charter, or the acts of congress giving it life. These enactments being public in their nature, courts will take judicial notice thereof.

We therefore respectfully ask that the judgment of the Circuit Court be affirmed.

BYRON MILLETT,

Attorney for Defendants in Error.

C. L. Sampson.

149 US 698

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1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 11th day of July, A. D. 1888, came E. R. Taggart, by Messrs. Patterson & Thomas, his attorneys, and filed in said court his complaint and sued out of and under the seal of said court a writ of summons against the Union Pacific Railway Company, and the said complaint is in words and figures as follows, to wit:

Complaint.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the Circuit Court of the Eighth Judicial Circuit in and for said District.

E. R. TAGGART, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

The plaintiff complains of the defendant and alleges:

1st. That he is a citizen of the city of Denver, county of Arapahoe and State of Colorado.

2nd. That the defendant is a corporation organized and doing business under the laws of the United States and for the purposes of jurisdiction is a citizen of the United States; that by virtue of its organization under and in pursuance of the said laws of the
2 United States this suit is a controversy arising under the said laws.

3rd. That the amount and value of the controversy in this cause exceeds, exclusive of costs and interest, the sum of two thousand dollars.

4th. That during the years A. D. 1885, 1886, and 1887 the plaintiff was and still is engaged in the business of buying and transporting coal from what is known as the Fox coal mine, situate at Marshall station, in the county of Boulder and State of Colorado, on one of the lines of the defendant company's railway, hereafter mentioned, said station being distant from the city of Denver about 25 miles, to the said city of Denver, in the county of Arapahoe, and selling the same to purchasers of coal in and near said city of Denver.

5th. That the defendant company, during all of said times, was a common carrier and the owner and in control and operation of divers lines of railway, both within and without the State of Colorado, and including all railways in the northern part of the State save and except the Denver, Utah & Pacific railway and the main line of the Burlington & Missouri railway; that defendant's said lines of railway in northern Colorado extended and do extend from divers

points and places in and beyond said northern Colorado to the said city of Denver.

6th. That being in possession and control of said lines of railway it became and was and is the duty of said defendant to operate the same as a common carrier for the benefit of the public and for the proper and prompt transaction of the business of its patrons to transport and carry articles of merchandise and freight
3 for all persons and corporations desiring to use its facilities and roads therefor on equal terms, for a reasonable, uniform, and proper charge for its services, without distinction or discrimination between individuals or companies, and with equal rates and opportunities to all engaged in the same class or character of business.

7. That during the years aforesaid, besides this plaintiff, a large number of persons and corporations at divers points and places in the State of Colorado north of the said city of Denver and along its said lines of railway and along the line of said Denver, Utah & Pacific railway were and still are engaged in the *the* business of mining, selling, and shipping coal for fuel and other purposes from their several mines so situate to the city of Denver aforesaid over said several lines of railway, said coal having been and still being used to supply the demands of the said citizens of *of* said city and vicinity, and in consequence whereof a large and prosperous business in coal mining and selling had grown up and was carried on in said city of Denver and from which the said defendant derived and still derives large revenue and profit.

8th. That said defendant company, as this plaintiff is informed and believes, and said other railway companies, in order to establish uniform rates and tolls for and among said coal miners and sellers and to enable each and every of them to enter and compete in the markets in said city of Denver for the sale of their commodity upon equal terms and without discrimination or disadvantage the one over the other, did, to wit, about the first day of January, A. D. 1885, fix and establish the charge and rate of one dollar per ton
4 for the shipment and transportation of coal from Erie, Marshall, Louisville, and other coal stations along its said lines of railway and through northern Colorado to said city of Denver, and did establish said rate as the standard, uniform, and general one for all persons and corporations engaged in said business at said points and places, whereby it contracted and agreed with the plaintiff and all others in said business that the said rates so fixed and established should constitute its standard and uniform charge for transportation of coal from said points and places to the said city of Denver, and which said rate so fixed and established as aforesaid was by the plaintiff acted upon, complied with, and believed to be the one applied by the said defendant company to all said coal shippers and sellers without preference, prejudice, or discrimination during all said time until, to wit, the month of August, A. D. 1887.

9th. That from the first day of November, A. D. 1885, up to and including the first day of September, A. D. 1887, the plaintiff

shipped and transported and caused to be shipped and transported from the said Fox coal mines at Marshall to said city of Denver, over defendant's line of railway, operated, as aforesaid, by it as a common carrier between said places during said time, twenty-three thousand five hundred ninety-three & $\frac{123}{500}$ tons of coal, and did pay the said defendant therefor as freight the sum of twenty-three thousand five hundred ninety-three & $\frac{25}{100}$ dollars, well believing that he was being charged no greater or less rate or toll than said defendant charged and collected from all his said competitors for the same service.

10th. The plaintiff further alleges that during all of the times hereinafter mentioned a certain corporation known as and styled the Marshall Consolidated Coal Mining Company, organized
5 and doing business under the laws of the State of Colorado, was the owner of and engaged in mining and extracting coal from certain coal mines known as and called the Marshall mines, and which said mines adjoined said Fox mines at or near said Marshall station, and was also engaged as a competitor of the plaintiff in supplying the said Denver markets with coal for fuel and other purposes of profit to itself; that the product from said Marshall Company's mines is shipped from and said mines are located on the same line of its railway, at the same station, and the same distance from the city of Denver; that, as the plaintiff is informed and believes, the mines which, as aforesaid, supplied the plaintiff with coal and said Marshall mines are upon the same vein or stratum of coal; that from the said first day of November, A. D. 1885, to and including the first day of September, A. D. 1887, the said Marshall Consolidated Coal Mining Company shipped many thousand- of tons, to wit, more than two hundred thousand tons, of coal per annum from said Marshall station, the greater part of which, as plaintiff is informed and believes, was shipped to and sold to consumers in and near said city of Denver.

11th. That during all of said time the output of the mines of said Marshall Consolidated Coal Mining Company increased and ample facilities for the transportation thereof were at all times supplied to it by the defendant, and the amount of coal sold by said Marshall Company in said city of Denver was, as the plaintiff is informed and believes, greatly in excess of that sold or which could have been sold at a profit by any of its competitors along the defendant's northern Colorado lines of railway, but until, to wit, the month of August, A. D. 1887, the plaintiff supposed that it was required to and did pay the defendant the same rates of toll and freight per ton on its coal to said city of Denver that said de-
6 fendant published, as aforesaid, as its regular rate and exacted from this plaintiff for the same service.

12th. Yet the plaintiff avers that the defendant company, notwithstanding its duty aforesaid and notwithstanding its agreement and its established and published rates of charge and toll as aforesaid and notwithstanding its said service of transportation for the plaintiff was the same as that by it performed for the said Marshall Consolidated Coal Mining Company, in disregard of its obligations

to plaintiff and to the public, from the said first day of November, A. D. 1885, to the said first day of September, A. D. 1887, while pretending and assuming to charge and receive from the said Marshall Company the sum of one dollar per ton for all coal so transported by it for said company from said Marshall to said city of Denver and bill*ed* its said coal between said points at said rates, in *in* order to conceal its practices in that behalf did secretly and clandestinely charge and receive from said Marshall Company the sum of sixty cents per ton for said services, thereby compelling the plaintiff to pay it the sum of forty cents per ton more than it charged the said Marshall Company, by means whereof it unjustly, unfairly, and unlawfully discriminated against this plaintiff in favor of said company, to the great damage and injury of this plaintiff.

13th. That by reason of said unjust and unlawful discrimination the plaintiff was put to great loss and damage in this, to wit, that he was wholly and unjustly deprived of a profit of forty cents per ton on each and every ton of coal by him shipped and sold during said period of time, and which he could have realized but for said practice of said defendant, and that the total amount of said profit of which he was as aforesaid deprived is nine thousand four hundred thirty-seven & $\frac{31}{100}$ dollars.

7 Wherefore he says he has been damaged by reason of the premises in the sum of nine thousand four hundred thirty-seven & $\frac{31}{100}$ —.

And for a second and additional cause of action the plaintiff says:

1st. That he is a citizen of the city of Denver, county of Arapahoe and State of Colorado.

2nd. That the defendant is a corporation organized and doing business under the laws of the United States and for the purposes of jurisdiction is a citizen of the United States; that by virtue of its organization under and in pursuance of the said laws of the United States this suit is a controversy arising under the said laws.

3rd. That the amount and value of the controversy in this cause exceeds, exclusive of costs and interest, the sum of two thousand dollars.

4th. That during the years A. D. 1885, 1886, and 1887 the plaintiff was and still is engaged in the business of buying and transporting coal from what is known as the Fox coal mine, situate at Marshall station, in the county of Boulder and State of Colorado, on one of the lines of the defendant company's railway hereafter mentioned, said station being distant from the city of Denver about 25 miles, to the said city of Denver, in the county of Arapahoe, and selling the same to purchasers of coal in and near said city of Denver.

5th. That the defendant company during all of said time was a common carrier and the owner and in control and operation of divers lines of railway both within and without the State of

8 Colorado and including all railways in the northern part of the State save and except the Denver, Utah & Pacific railway and the main line of *of* the Burlington & Missouri railway; that defendant's said lines of railway in northern Colorado ex-

tended and do extend from divers points and places in and beyon said northern Colorado to the said city of Denver.

6th. That, being in possession and control of said lines of railway, it became and was and is the duty of said defendant to operate the same as a common carrier for the benefit of the public and for the proper and prompt transaction of the business of its patrons to transport and carry articles of merchandise and freight for all persons and corporations desiring to use its facilities and roads therefor on equal terms for a reasonable, uniform, and proper charge for its services without distinction or discrimination between individuals and companies and with equal rates and opportunities to all engaged in the same class or character of business.

7th. That during the years aforesaid, besides this plaintiff, a large number of persons and corporations at divers points and places in the State of Colorado north of the said city of Denver and along its said lines of railway and along the line of said Denver, Utah & Pacific railway were and still are engaged in the business of mining, selling, and shipping coal for fuel and other purposes from their several mines so situate to the city of Denver aforesaid over said several lines of railway, said coal having been and still being used to supply the demands of the said citizens of said city and vicinity, and in consequence whereof a large and prosperous business in coal mining and selling had grown up and was carried on in said city of Denver, and from which the said de-
9 fendant derived and still derives large revenue and profit.

8th. That said defendant company, as plaintiff is informed and believes, and said other railway companies, in order to establish uniform rates and tolls for and among said coal miners and sellers and to enable each and every of them to enter and compete in the markets in said city of Denver for the sale of their commodity upon equal terms and without discrimination or disadvantage the one over the other, did, to wit, about the first day of January, A. D. 1885, fix and establish the charge and rate of one dollar per ton for the shipment and transportation of coal from Erie, Marshall, Louisville, and other coal stations along its said lines of railway and through northern Colorado to said city of Denver, and did establish said rate as the standard, uniform, and general one for all persons and corporations engaged in said business at said points and places, whereby it contracted and agreed with the plaintiff and all others in said business that the said rates so fixed and established should constitute its standard and uniform charge for transportation of coal from said points and places to the said city of Denver, and which said rate so fixed and established as aforesaid was by the plaintiff acted upon, complied with, and believed to be the one applied by the said defendant company to all said coal shippers and sellers without preference, prejudice, or discrimination during all said time until, to wit, the month of August, A. D. 1887.

9th. That from the first day of November, A. D. 1885, up to and including the first day of September, A. D. 1887, the plaintiff shipped and transported and caused to be shipped and transported

from the said Fox coal mines at Marshall to said city of
10 Denver, over defendant's line of railway operated as aforesaid by it as a common carrier between said places during said time, twenty-three thousand five hundred ninety-three & $\frac{123}{200}$ tons of coal, and did pay the said defendant therefor as freight the sum of twenty-three thousand five hundred ninety-three & $\frac{25}{100}$ dollars, well believing that he was being charged no greater or less rate or toll than said defendant charged and collected from all his said competitors for the same service.

10th. The plaintiff further alleges that during all of the times hereinafter mentioned a certain corporation known as and styled the Marshall Consolidated Coal Mining Company, organized and doing business under the laws of the State of Colorado, was the owner of and engaged in mining and extracting coal from certain coal mines known as and called the Marshall mines, and which said mines adjoined said Fox mines at or near said Marshall station, and was also engaged as a competitor of the plaintiff in supplying the said Denver markets with coal for fuel and other purposes of profit to itself; that the product from said Marshall Company's mines is shipped from and said mines are located on the same line of its railway at the same station and the same distance from the city of Denver; that, as the plaintiff is informed and believes, the mines which as aforesaid supplied the plaintiff with coal and said Marshall mines are upon the same vein or stratum of coal; that from the said first day of November, A. D. 1885, to and including the said first day of September, A. D. 1887, the said Marshall Consolidated Coal Mining Company shipped many thousands of tons, to wit, more than two hundred thousand tons, of coal per annum from said Marshall station, the greater part of which, as plaintiff is informed and believes, was shipped to and sold to consumers in and near said city of Denver.

11 11th. That during all of said times the output of the mines of said Marshall Consolidated Coal Mining Company increased, and ample facilities for the transportation thereof were at all times supplied to it by the defendant, and the amount of coal sold by said Marshall Company in said city of Denver was, as the plaintiff is informed and believes, greatly in excess of that sold or which could have been sold at a profit by any of its competitors along the defendant's northern Colorado lines of railway, but until, to wit, the month of August, A. D. 1887, the plaintiff supposed that it was required to and did pay the defendant the same rates of toll and freight per ton on its coal to said city of Denver that said defendant published as aforesaid as its regular rate and exacted from this plaintiff for the same service.

12th. Yet the plaintiff avers that the defendant company, notwithstanding its duty aforesaid, and notwithstanding its agreement and its established and published rates of charge and toll as aforesaid, and notwithstanding its said service of transportation for the plaintiff was the same as that by it performed for the said Marshall Consolidated Coal Mining Company, and notwithstanding it had agreed to transport coal between the points aforesaid for the

plaintiff as cheaply as for any other person or persons, yet, disregarding its obligations to the plaintiff and to the public, from the said first day of November, A. D. 1885, to the said first day of September, A. D. 1887, while pretending and assuming to charge and receive from the said Marshall Company the sum of one dollar per ton for all coal transported by it from said Marshall to the said city of Denver, yet the plaintiff avers that it billed the coal of said Marshall Company between said points at said rate, and did
12 receive in the first instance from the said mining company the said rate of one dollar per ton for all coal so transported, and did thereupon then and there repay to the said Marshall Consolidated Coal Mining Company a reduction or rebate of forty cents per ton on each and every ton of coal so by it transported from said Marshall to the city of Denver, by means whereof it actually charged the said Marshall Company the sum of but sixty cents per ton for all coal by it so transported from said Marshall Company's mines situate near its line of railway to the city of Denver instead of the said sum of one dollar per ton which it pretended to charge the said Marshall Company and which it actually charged all others engaged in said business, by means whereof it unjustly, unfairly, and unlawfully discriminated against the plaintiff and in favor of the said company, to the great damage and injury of this plaintiff; that by reason of the premises aforesaid the defendant undertook and agreed to repay to the plaintiff the said sum of forty cents per ton which it repaid to the said Marshall Company for the same service.

13th. That on, to wit, the first day of September, 1887, the plaintiff demanded from the defendant the sum of nine thousand four hundred thirty-seven & $\frac{31}{100}$ dollars, the amount of said overcharge to this plaintiff, but the said defendant then and there wholly refused and still refuses to pay the same or any part thereof.

And for a third and additional cause of action against the said defendant the plaintiff says:

1st. That he is a citizen of the city of Denver, county of Arapahoe and state of Colorado.

13 2nd. That the defendant is a corporation organized and doing business under the laws of the United States and for the purposes of jurisdiction is a citizen of the United States; that by virtue of its organization under and in pursuance of the said laws of the United States this suit is a controversy arising under the said laws.

3rd. That the amount and value in this cause exceeds, exclusive of costs and interest, the sum of two thousand dollars.

4th. That during the years A. D. 1885, 1886, and 1887 the plaintiff was and still is engaged in the business of buying and transporting coal from what is known as the Fox coal mine, situate at Marshall station, in the county of Boulder and State of Colorado, on one of the lines of the defendant company's railway, hereafter mentioned, said station being distant from the city of Denver about 25 miles, to the said city of Denver, in the county of Arapahoe, and selling the same to purchasers of coal in and near said city of Denver.

5th. That the defendant company during all of said times was a common carrier and the owner and in control and operation of divers lines of railway both within and without the State of Colorado and including all railways in the northern part of the State save and except the Denver, Utah & Pacific railway and the main line of the Burlington & Missouri railway; that defendant's said lines of railway in northern Colorado extended and do extend from divers points and places in and beyond said northern Colorado to the said city of Denver.

14 6th. That being in possession and control of said lines of railway, it became and was and is the duty of said defendant to operate the same as a common carrier for the benefit of the public and for the proper and prompt transaction of the business of its patrons to transport and carry articles of merchandise and freight for all persons and corporations desiring to use its facilities and *and* roads therefor on equal terms, for a reasonable, uniform, and proper charge for its services, without distinction or discrimination between individuals and companies, and with equal rates and opportunities to all engaged in the same class or character of business.

7th. That during the years aforesaid, besides the plaintiff, a large number of persons and corporations at divers points and places in the State of Colorado north of the said city of Denver and along its said lines of railway and along the line of said Denver, Utah & Pacific railway were and still are engaged in the business of mining, selling, and shipping coal for fuel and other purposes from their several mines so situate to the city of Denver aforesaid over said several lines of railway said coal, having been and still being used to supply the demands of the said citizens of said city and vicinity, and in consequence whereof a large and prosperous business in coal mining and selling had grown up and was carried on in said city of Denver, and from which the said defendant derived and still derives large revenue and profit.

8th. That said defendant company, as this plaintiff is informed and believes, and said other railway companies, in order to establish uniform rates and tolls for and among said coal miners and sellers and to enable each and every of them to enter and

15 compete in the markets in said city of Denver for the sale of their commodity upon equal terms and without discrimination or disadvantage the one over the other, did, to wit, about the first day of January, A. D. 1885, fix and establish the charge and rate of one dollar per ton for the shipment and transportation of coal from Erie, Marshall, and Louisville and other coal stations along its said lines of railway and through northern Colorado to said city of Denver, and did establish said rate as the standard, uniform, and general one for all persons and corporations engaged in said business at said points and places, whereby it contracted and agreed with the plaintiff and all others in said business that the said rates so fixed and established should constitute its standard and uniform charge for transportation of coal from said points and places to the said city of Denver, and which said rate so fixed and established as aforesaid was by the plaintiff acted upon, complied with,

and believed to be the one applied by the said defendant company to all said coal shippers and sellers without preference, prejudice, or discrimination during all the said time until, to wit, the month of August, A. D. 1887.

9th. That from the first day of January, A. D. 1885, up to and including the first day of September, A. D. 1887, the plaintiff shipped and transported and caused to be shipped and transported from the said Fox coal mines at Marshall to said city of Denver over defendant's line of railway, operated, as aforesaid, by it as a common carrier between said places during said time, twenty-three thousand five hundred ninety-three & $\frac{2}{5}\frac{3}{0}\frac{3}{0}$ tons of coal and did pay the said defendant therefor as freight the sum of twenty-three thousand five hundred ninety-three & $\frac{2}{1}\frac{5}{0}\frac{}{0}$ dollars, well be-
16 lieving that he was being charged no greater or less rate or toll than said defendant charged and collected from all of his said competitors for the same service.

10th. The plaintiff further alleges that during all of the times hereinafter mentioned a certain corporation known as and styled the Marshall Consolidated Coal Mining Company, organized and doing business under the laws of the State of Colorado, was the owner of and engaged in mining and extracting coal from certain coal mines known as and called the Marshall mines, and which said mines adjoined said Fox mines at or near said Marshall station, and *and* was also engaged as a competitor of the plaintiff in supplying the said Denver markets with coal for fuel and other purposes of profit to itself; that the product from said Marshall Company's mines is shipped from and said mines are located on the same line of its railway, at the same station, and the same distance from the city of Denver; that, as the plaintiff is informed and believes, the mines which, as aforesaid, supplied the plaintiff with coal and said Marshall mines are upon the same vein or stratum of coal.

That from said first day of November, A. D. 1885, to and including the said first day of September, A. D. 1887, the said Marshall Consolidated Coal Mining Company shipped many thousands of tons, to wit, more than two hundred thousand tons, of coal per annum from said Marshall station, the greater part of which, as plaintiff is informed and believes, was shipped to and sold to consumers in and near said city of Denver.

17 11th. That during all of said times the output of the mines of said Marshall Consolidated Coal Mining Company increased, and ample facilities for the transportation thereof were at all times supplied to it by the defendant, and the amount of coal sold by said Marshall Company in said city of Denver was, as the plaintiff is informed and believes, greatly in excess of that sold or which could have been sold at a profit by any of its competitors along the defendant's northern Colorado lines of railway, but until, to wit, the month of August, A. D. 1887, the plaintiff supposed that it was required to and did pay the defendant the same rates of toll and freight per ton on its coal to said city of Denver that said defendant published, as aforesaid, as its regular rate and exacted from this plaintiff for the same service.

12th. Yet the plaintiff avers that the defendant company, notwithstanding its duty aforesaid, and notwithstanding its agreement and its established and published rates of charge and toll as aforesaid, and notwithstanding its said service of transportation for the plaintiff was the same as that by it performed for the said Marshall Consolidated Coal Mining Company, in disregard of its obligations to plaintiff and to the public, from said first day of November, A. D. 1885, to the said first day of September, A. D. 1887, while pretending and assuming to charge and receive from the said Marshall Company the sum of one dollar per ton for all coal so transported by it for said company from said Marshall to the said city of Denver and billed its said coal between said points at said rate in order to conceal its practices in that behalf, did secretly and clandestinely charge and receive from said Marshall Company the sum of
18 sixty cents per ton for said services, thereby compelling the plaintiff to pay it the sum of forty cents per ton more than it charged the said Marshall Company, by means whereof it unjustly, unfairly, and unlawfully discriminated against this plaintiff in favor of said company, to the great damage and injury of this plaintif-.

13th. That by reason of said unjust and unlawful discrimination the plaintiff was put to great loss and damage, in this, to wit, that he was wholly and unjustly deprived of his forty cents profit per ton on each and every ton of coal sold by him during said period of time, and which he could and would have realized but for said practice of said defendant; that the total amount of which he was deprived is nine thousand four hundred thirty-seven & $\frac{31}{100}$ dollars, and that on, to wit, the first day of September, A. D. 1887, he demanded payment of said sum of money from defendant, but which demand the defendant then and there wholly refused to comply with and still refuses to comply with, to the damage of the plaintiff in the sum of nine thousand four hundred thirty-seven & $\frac{31}{100}$ dollars.

And for a further and additional cause of action against the defendant the plaintiff says:

1st. That during the years 1885, 1886, and 1887 the plaintiff was and still is engaged in the business of buying and transporting coal from what is known as the Fox mine, situate at Marshall station, in the county of Boulder and State of Colorado, on one of the lines of the defendant company's railway, hereafter mentioned, said station being distant from the city of Denver about 25 miles, to the city of Denver, *and* said county of Arapahoe, and selling the same to purchasers of coal in and near said city.

19 2nd. That the defendant company during all of said time was a common carrier and the owner and in control and operation of divers lines of railway both within and without the State of Colorado and including nearly all the railways in the northern part of the State, said lines running from divers points and places in said northern Colorado to the said city of Denver.

3rd. That being in possession and control of said lines of railway, it became and was and is the duty of said defendant to operate the

same as a common carrier for the benefit of the public and for the proper and prompt transaction of the business of its patrons to transport and carry articles of merchandise and freight for all persons or corporations desiring to use its facilities therefor for a reasonable, proper, and uniform charge of toll, without distinction or discrimination between individuals or companies, and with equal rights and privileges to all engaged in the same class or character of business.

4th. That during the years aforesaid, besides this plaintiff, a large number of persons and corporations at divers points and places in the State of Colorado north of the city of Denver and along the defendant's said lines of railway were and still are engaged in the business of mining, selling, and shipping coal for fuel and other purposes from their several mines so situate to the city of Denver aforesaid over said several lines of railway, said coal having been and still being used to supply the demands of the inhabitants of said city and vicinity, in consequence whereof a large and prosperous business in said coal mining and selling had grown up and was carried on between said places and the city of Denver, and
20 from which said defendant company derived and still derives large revenue and profit.

5th. That the defendant company, as the plaintiff is informed and believes, in order to establish uniform rates of toll for and among said coal miners and sellers and to enable each and every of them to compete in the markets of Denver upon equal terms and without disadvantage the one over the other and in order to comply with the requirements of the laws of the State of Colorado in that behalf provided, did post up and cause to be posted up some time about the month of May, A. D. 1885, and from thence thereafter in a conspicuous place in the passenger depots along its lines of railroad, to wit, at Erie, Marshall, Louisville, and other stations along its said lines, a printed copy of the classification and schedule of rates and freight charges then in force and for the use of patrons of the road; that the said classification and schedule, among other things, provided for the rate and classification on coal from said stations to the said city of Denver, and said rate was established at one dollar per ton from said stations to the said city of Denver, the same being thereby fixed as the standard and uniform and general one for all persons and corporations engaged in business at said points and places, and that said rate so fixed and established as aforesaid was by the plaintiff acted upon, complied with, and believed to be the one applied by said defendant to all coal producers without prejudice and discrimination until, to wit, the month of September, A. D. 1887.

6th. That from the first day of November, A. D. 1885, up to and including the first day of September, A. D. 1887, the plaintiff shipped and transported and caused to be shipped and transported from said Fox coal mines, at Marshall, to said city of Denver,
21 over said defendant's lines of railway operated by it as aforesaid as a common carrier between said places during said time, twenty-three thousand five hundred ninety-three & ¼ tons of

coal, and did pay therefor to the defendant as freight, pursuant to the said classification and rate, the sum of twenty-three thousand five hundred ninety-three & $\frac{25}{100}$ dollars, well believing that he was being charged no greater rate or toll than said defendant charged and collected from all said persons and companies as said competitors for the same service.

7th. Plaintiff further alleges that during all the times hereinafter mentioned a certain corporation known as and styled the Marshall Consolidated Coal Mining Company, organized and doing business under the laws of the State of Colorado, was the owner of and engaged in mining and extracting coal from certain coal mines known as and called the Marshall mines and which said mines adjoin said Fox mines at or near said Marshall station, and was also engaged with the plaintiff as a competitor for supplying the said Denver markets with coal for fuel and other purposes of profit to itself; that the product from said Marshall Company's mines is shipped from and said mines are mostly located on the defendant's line of railway at the same station and the same distance from said city of Denver, and that, as plaintiff is informed and believes, the mines which as aforesaid supply the plaintiff with coal and said Marshall mines are upon the same vein or stratum of coal; that from the first day of November, A. D. 1885, up to and including the first day of September, A. D. 1887, the said Marshall Consolidated Coal Mining Company shipped and transported over the defendant's lines of railway many thousands of tons of coal,
22 to wit, more than two hundred thousand tons of coal, per annum from said Marshall coal mines, the greater part of which, as plaintiff is informed and believes, was shipped to consumers in and about said city of Denver, and that the services of the said defendant company to the said Marshall Company was while the said defendant was operating under the classification and schedule then in force as aforesaid, and the said service was of like service from the same place and upon like conditions and under similar circumstances the same as that performed by the defendant for this plaintiff.

8th. Yet the plaintiff avers the said defendant, without the approval of any other person whomsoever, did in fact charge, demand, and receive from him while operating under said classification and a schedule then in force for the transshipment of coal a greater sum per ton than it in fact demanded and received from the said Marshall Consolidated Coal Mining Company for the same service from the same place upon like conditions and under similar circumstances in this, to wit, that it only asked, demanded, and received from the said Marshall Consolidated Coal Mining Company for the shipment of coal from said station to the said city of Denver during said time, to wit, from the first day of November, A. D. 1885, to the first day of September, A. D. 1887, the sum of sixty cents per ton for its said coal, being forty cents per ton less than the rate charged, demanded, and received from this plaintiff.

9th. The plaintiff alleges that the said defendant company did, by reason of the premises, between the first day of November, A. D.

1885, and the first day of September, A. D. 1887, charge, demand, and receive from him a greater sum than it while operating under the same classification and schedule charged, demanded, and
23 received from the said Marshall Company for like services from the same place and upon like conditions and under similar circumstances, yet that it refuses and has refused to allow the same concession or any concession of rates, drawbacks, or contracts for special rates to this plaintiff which it has granted to the said Marshall Consolidated Coal Mining Company during the said period of time.

10th. That the actual damage sustained and overcharges paid by the plaintiff by reason of the premises to the said defendant is nine thousand four hundred thirty-seven & $\frac{31}{100}$ dollars.

Wherefore the plaintiff prays judgment—

First. For the sum of nine thousand four hundred thirty-seven & $\frac{31}{100}$ dollars under the first three paragraphs of this complaint, with interest thereon, at ten per cent. per annum, from the first day of September, A. D. 1887, to date of judgment.

Second. For the sum of $28,311.90, the statutory damages against the said defendant, for the said cause of action stated in *in* the fourth paragraph of this complaint.

Third. For costs of suit and a reasonable attorney's fee to be fixed by the court herein.

PATTERSON & THOMAS,
Att'ys for Plaintiff.

(Indorsed:) No. 2236. E. R. Taggart *vs.* The Union Pacific Railway Co. Complaint. Filed Jan. 11, 1888. William A. Willard, clerk. Patterson & Thomas, att'ys for plaintiff.

24 And the said summons and proof of service thereof is in words and figures as follows, to wit:

Summons.

In the Circuit Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

E. R. TAGGART, Plaintiff, *versus* THE UNION PACIFIC RAILWAY COMPANY, Defendant. } Complaint Filed in the Clerk's Office this Eleventh Day of January, A. D. 1888.

The President of the United States of America to the Union Pacific Railway Company, Greeting:

You are hereby notified that an action has been brought in said court by E. R. Taggart, plaintiff, against you as defendant to recover the sum of $9,437.30 as damages, with interest, at 10% per annum, from Sept. 1, 1887, to date of judgment, for overcharges for hauling

coal from the Fox coal mine, Marshall station, Boulder county, in said district, for the sum of $28,311.90 statutory damages, for costs of suit and a reasonable attorney's fee, as more particularly set forth and described in the complaint filed herein, to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 11th day of January, A. D. 1888, and of the Independence of the United States the 112th year.

Seal Cir. C't U. S., Dist. of Colo.

(Signed) WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

A true copy.
Teste: WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Proof of Service.

UNITED STATES OF AMERICA, *District of Colorado*, } ss:

JAN'Y 14TH, A. D. 1888.

I hereby certify that I received the within writ on the 11th day of January, A. D. 1888, and that I have personally served the same upon the said defendant, The Union Pacific R'y Co., by delivering to Joseph K. Choate, the superintendent of said company in Colorado, personally, a true copy of the within writ at the time and place as follows: At Denver, county of Arapahoe, on the 14th day of January, A. D. 1888.

This writ therefore returned executed as the law directs this 14th day of January, A. D. 1888.

ZEPH. T. HILL, *Marshal*,
By E. C. CURRIER,
Deputy Marshal.

(Indorsed:) Gen. No., 2236. Circuit court of the United States for the district of Colorado. E. R. Taggart, plaintiffs, *versus* The Union Pacific Railway Company, defendants. Summons. Filed this 14 day of Jan., A. D. 1888. William A. Willard, clerk, by F. W. Tupper, deputy clerk. Patterson and Thomas, of Denver, attorneys for plaintiff.

And afterwards and on, to wit, the 31st day of March, A. D. 1888, the same being one of the regular juridical days of the November term, A. D. 1887, of said court—present, the Honorable Moses Hallet, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Demurrer to Complaint Overruled.

E. R. TAGGART
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2236. Action for Damages.

At this day comes the said plaintiff, by C. S. Thomas, Esq., his attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

27 And the demurrer of the said defendant to the complaint herein having heretofore come on to be heard and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it seemeth to the court now here that the said complaint is sufficient in law and so the said demurrer is overruled.

And afterwards and on, to wit, the 12th day of May, A. D. 1888, the same being one of the regular juridical days of the May term, A. D. 1888, of said court—present, the Honorable David J. Brewer, circuit judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Answer in 15 Days.

E. R. TAGGART
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2236. Action for Damages.

At this day comes the said plaintiff, by C. S. Thomas, Esq., his attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

And thereupon, on motion of the said plaintiff, it is ordered by the court that the said defendant answer herein within fifteen days from this day.

And afterwards and on, to wit, the 14th day of May, A. D. 1888, the same being one of the regular juridical days of the May term, A. D. 1888, of said court—present, the Honorable David J.

28 Brewer, circuit judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Leave to Amend Complaint.

E. R. TAGGART
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2236. Action for Damages.

At this day comes the said plaintiff, by C. S. Thomas, Esq., his attorney, and, on his motion, it is ordered by the court that he have leave to amend his complaint herein as he shall be advised.

And afterwards and on the same day, to wit, the 14th day of May, A. D. 1888, came again the said plaintiff, by his attorneys aforesaid, and filed in said court and in said cause his amendment to the complaint heretofore filed herein, and the said amendment is in words and figures as follows, to wit:

Amendment to Complaint.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court in and for said District.

E. R. TAGGART
vs.
THE UNION PACIFIC RAILWAY COMPANY.

29 The plaintiff now comes and by leave of court files instanter the following amendment to the fourth cause of action in said complaint set forth:

10th. The plaintiff further alleges that the defendant, as well as said Marshall Company, carefully, intentionally, and fraudulently kept its acts and doings in this behalf hereinabove alleged against it concealed and hidden from the knowledge of this plaintiff and from all other persons whomsoever until, to wit, during the month of August, A. D. 1887, when the same was discovered and made public for the first time by the Pacific railway's commission, duly appointed by act of Congress in that behalf enacted, and this plaintiff was then for the first time made aware and knew of the existence of the matters and things hereinbefore alleged.

PATTERSON & THOMAS,
Att'ys for Pl'ff.

(Indorsed:) No. 2236. U. S. circuit court, district of Colorado. E. R. Taggart *vs.* The Union Pacific R'y Co. Amendment to complaint. Filed May 14, 1888. William A. Willard, clerk. Patterson & Thomas, for pl'ff.

And afterwards and on, to wit, the 25th day of May, A. D. 1888, came the said defendant, by Messrs. Teller & Orahood, its attorneys, and filed in said court and in said cause its answer to the complaint heretofore filed herein, and the said answer is in words and figures as follows, to wit:

30 *Answer.*

In the Circuit Court of the United States, District of Colorado.

E. R. TAGGART, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

And the said defendant, answering the complaint of the plaintiff herein, denies each and every material allegation in said complaint contained.

II.

And for a further answer says that whether the said complainant was in the years 1885, 1886, and 1887 or at any other time engaged in the business of buying and transporting coal from what is known as the Fox coal mine, at Marshall station, in the county of Boulder, or elsewhere, to the city of Denver, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

This defendant, further answering, says it admits that about the 1st day of January, 1885, it did fix and establish the charge and rate of one dollar per ton for the shipment and transportation of coal from Erie, Marshall, and Louisville stations along its said line of railway to the city of Denver, and established such rate as the standard, uniform, and general one for all persons and corpora-
31 tions engaged in such business at said points and places—that is to say, as the general rate to be paid in cash independant of any other considerations which might pass between the parties carrying coal over the defendant's roads; that the said rate so fixed and established did constitute its standard and uniform charge for the transportation of coal under the circumstances aforesaid, and that said rates were published as its schedule rates and were intended — apply without discrimination to all persons carrying or conveying coal over its road where persons were similarly situated; that as to how much coal the said plaintiff transported or caused to be transported or shipped and transported from the said Fox coal mine to Denver during the said time mentioned in the said complaint and whether or no the same amounted to 23,593 tons or to any other amount this defendant has not and cannot obtain sufficient information on which to base a belief, and therefore denies that any such amount was ever carried by this defendant for the said plaintiff.

Defendants admits that during all of the times mentioned in the said complaint, to wit, from the time stated in the said complaint, in 1885, up until the time of the commencement of this suit, there was a certain corporation known and styled the Marshall Consolidated Coal Mining Company, which was duly organized for the purpose of working the said mines at the said Marshall station and was engaged in mining and transporting coal to Denver, and the said Marshall Consolidated Coal Mining Company's mines were situated

at about the same distance from the city of Denver as those of the said plaintiff; that as to whether said Marshall Company's vein is upon the same strata this defendant knows nothing.

32 This defendant denies that the output of the mines of the said Marshall Consolidated Coal Mining Company was at any time increased or that the amount of its coal sold was ever increased over that of any of its competitors on account of any act or thing done or omitted to be done by this defendant in respect to the carriage or transportation of the coal of the said Marshall Company.

This defendant further specially denies that it did from the 1st day of November, 1885, up to the 1st day of September, 1887, or at any other time conceal any of its practices or doings with the said Marshall Company from the said plaintiff or any other person or persons, or that it did secretly or clandestinely or otherwise charge or receive from the said Marshall Company the sum of sixty cents per ton only for its services in carrying coal for said company to Denver; and denies that it did ever or in any manner whatever or at any time whatever compel the plaintiff to pay the sum of forty cents per ton more than it charges the said Marshall Company, or that it ever unjustly, unfairly, or unlawfully discriminated against said plaintiff in favor of said Marshall Company, to the injury of the said plaintiff or otherwise.

Denies that by reason of any injustice or unlawful discrimination the plaintiff was put to any loss or damage whatever or that he was ever in any manner by an act of defendant deprived of any profit either of forty cents per ton or any other amount whatever upon any coal carried by this defendant for the said plaintiff; and denies that it was deprived of any profit of $9,437, or any other sum; and denies that he has ever been damaged by reason of the premises in the sum of $9,000, or in any other sum whatever.

33 Said defendant further denies that the amount of coal sold by said Marshall Consolidated Coal Mining Company was greatly in excess of that sold or which could have been sold by the said Marshall Consolidated Mining Company; said defendant further denies that it ever agreed to transport coal between the points named in the complaint or elsewhere for plaintiff as cheaply as it did for other persons, but it especially avers that although it made no such agreement, yet as a matter of fact it did transport coal between said points for plaintiff as cheap as it did for any other person or corporation.

Said defendant further denies that it ever did receive in the first instance or otherwise from the said Marshall Consolidated Coal Mining Company said rate of one dollar per ton for transportation of coal and did afterwards or at any time repay to said Marshall Consolidated Company a reduction of forty cents on each ton so transported; and denies that by any means whatever it actually charged the Marshall Consolidated Coal Mining Company the sum of sixty cents per ton for all coal or any coal by it so transported from the said Marshall mine; and denies that by any means whatever it ever unjustly, unfairly, or unlawfully discriminated against

the plaintiff in favor of the said Marshall Consolidated Company or in favor of any person or company whatever.

And the said defendant further denies that it ever did in fact charge and demand or receive from the defendant while operating under any classification or schedule whatever for the transshipment of coal a greater sum per ton than it in fact demanded or received from the said Marshall Consolidated Coal Mining Company for the same service from the same place upon like conditions and
34 under similar circumstances; and denies that from the first day of November, 1885, to the first day of September, 1887, or at any other time it demanded from the said Marshall Company the sum of sixty cents per ton for the transportation of its said coal; and denies that it ever refused to allow any concession of rates, drawbacks, or contracts for special rates to the plaintiff which it had not granted to other parties; and denies that it ever offered any special rates whatever.

II.

And this defendant, for a further and second answer herein, says that heretofore, to wit, on or about the first day of May, 1880, the Denver, Western and Pacific Railway Company was a corporation organized under the laws of the State of New York and engaged in building a railroad from the city of Denver to the town of Boulder and Longmont; that the line of said defendant's road passed near to certain lands owned and operated by Augustine G. Langford & others and known as the Marshall coal mine, which said lands were situate in the county of Boulder, about four miles this side of the town of Boulder; that said railway company in constructing the line of its road ran so near the said mine as that a portion of the workings on the grading of said road broke into the workings of the said mine; that said breaking in by the construction of said road was claimed to be negligence on the part of said railway authorities, and, as it was claimed, resulted in a great loss and damage to the owners of the said mine; that in consequence of the breaking in of said mine it was claimed that the mine took fire and continued to burn for many months, destroying large amounts of coal, large amounts of
35 personal property therein contained, and entailing a large amount of expense on the said owners thereof in walling up portions of the mine and subduing the fires therein set as aforesaid; that thereupon suits were instituted by the owners of the mine against said railway company, which said suits were litigated at great expense and for several years in the district court of the county of Boulder and were in litigation and undetermined at the times hereinafter mentioned; that in addition to the damages so claimed by the owners on account of said fire the said railway company had failed to obtain the right of way across the grounds of the said Langford & others constituting the mine heretofore referred to; that the said Denver Western Pacific Railway Companies ran their road across the said coal lands owned by the said Langford and others for a distance of about a mile; that Jan'y 16th, 1882, the said Denver, Western

& Pacific Railway Company having become involved in litigation, a judgment was obtained against said company in the name of Charles R. Abbott and Henry Given for the sum of $64,000, which judgment was obtained upon a mechanic's lien and was duly filed of record in the district court of Arapahoe county and thereupon became and was a lien upon all of the road-bed of the said Denver Pacific Railway Company; that subsequently the Union Pacific Railway Company became interested in and the owners of the said judgment, and also of a large number of bonds which had been issued upon and *was* a lien upon the said Denver, Western and Pacific Railway Company, upon its line of road, and the franchises of the said company; that the said road and all the property of the said company was subsequently sold on said lien and came into the hands of the Union Pacific Railway Company and parties
36 intimately connected therewith; that afterwards, to wit, in the year 1885, in order to make said property valuable to the said railway company, a corporation was duly formed under the laws of the state of Colorado under the name of Denver, Marshall & Boulder R'y Co., which said corporation was owned and controlled by the Union Pacific Railway Company, and the said Union Pacific Railway Company thereupon proceeded to construct said line of road from Denver to Boulder, and especially to and past the said Marshall coal mine; that the said claim against the said Denver, Western and Pacific Railway Company had before that time and before the sale of the same upon the judgments aforesaid become a lien upon the road-bed and property of the said Denver, Western and Pacific Railway Company, and after the formation of the said Marshall & Boulder Railway Company the said claim or suit was still being pressed against said property and remained still a lien upon the said road and was a lien at the time hereinafter stated.

That about the year 1885 the said Langford and others, the owners of the said Marshall coal mine, sold the same to the Marshall Consolidated Coal Mining Company, who then and there became the owners of the said mine, and also by assignment to them the owners of the said claim so in litigation for damages done to the said mine by reason of the acts of the Denver, Western and Pacific Railway Company then being held against said Marshall and Boulder Railway Company; that in 1885 the said Union Pacific Railway Company was the owner of a certain coal mine at or near Louisville, in Boulder county.

37 Defendant further shows that, in addition to the judgments and liens against the Denver, Western and Pacific Railway Company above stated, there was also existing from the first day of January, 1881, certain debts by way of bonds and mortgage made by the said Denver, Western and Pacific Railway Company to the extent of about one million dollars; that said bonds were secured by a deed of trust *or* mortgage upon all of the right of way and property of the said Denver, Western and Pacific Railway Company in Colorado and were a lien upon said property; that some time in the year 1883 the Farmers' Loan and Trust Company, the trustee in said mortgage, commenced a suit for foreclosure against

said Denver, Western and Pacific Railway Company, to which suit Sidney Dillon, Augustine G. Langford, and Joseph M. Marshall, owners of said Marshall coal mine, were made parties; that upon such foreclosure the said owners of the said Marshall coal mine answered by setting up the facts above stated as to the running of the said Denver, Western and Pacific railway over its said lands without obtaining any right to do so, and also the damages accruing to said mine by reason of the said negligent acts of the said Denver, Western and Pacific Railway Company, and claiming that by such acts they had been injured to the extent of eighty-one thousand dollars ($81,000).

This defendant further shows that such proceedings were afterwards had in said suit then pending for the foreclosure of the said trust deed against the Denver, Western and Pacific Railway Company that the said property was put up and sold at master's sale under decree of foreclosure entered in said case; that the rights of the said Langford and others, as shown by their petition, were not adjudicated at that time, and their claim and accounting
38 was still undetermined; that at said sale the title was acquired by parties who were acting in behalf of the Union Pacific Railway Company, who then and there at the time of said master's sale had a large interest therein, being the owner of a large number of said bonds of the Denver, Western and Pacific Railway Company; that the said interests of the said Denver, Western and Pacific Railway Company were sold April 4th, 1885, for the sum of three hundred thousand dollars.

That said master's sale was made on the 4th day of April, 1885, and some time thereafter the said party in interest, who had bid for said property on said master's sale, to wit, Harper M. Orahood, sold and conveyed the same to the Denver, Marshall, and Boulder Railway Company, leaving the said claims of the said Marshall Coal Mining Company unadjusted and unpaid, being still a lien upon the property so conveyed to the Denver, Marshall and Boulder Railway Company.

This defendant further shows that for some time prior to October 13th, 1885, it was receiving its coal for the purpose of running its locomotives from the Union Coal Mining Company, which said company was working a certain coal mine, known as the Welch coal mine, situate on Coal creek, in Boulder county; that the title under which the said Welch Coal Mining Company was working arose by and through a proposition made by the said C. C. Welch on the 1st day of November, 1878, to the said Welch Coal Mining Company, which proposition was accepted by the Welch Coal Mining Company on the said first day of November, 1878, and was evidenced by the written resolution of the said company *past* at a meeting of the directors of the same on said 1st day of November, 1878, in words and figures following, to wit:

39 Resolved, That the proposition of Charles C. Welch to lease to this company his mines and lands on Coal creek, in Boulder county, in the State of Colorado, and to sell his engines, boilers,

tools, implements, machinery, fixtures, and materials on hand at said mines, etc., this day made to this company, be, and the same is hereby, accepted.

Carried.

Resolution offered by F. L. Welch:

Resolved further, That 997 full-paid shares of the capital stock of this company be issued and delivered, properly signed, to the said Charles C. Welch, in full payment for the machinery, cars, tools, implements, material, fixtures, etc., at said coal mines this day purchased of the said Welch and for the expense of opening the said mine.

Carried.

And also by an assignment of said lease last above mentioned, made by the said Welch Coal Mining Company *and* to the Union Coal Company; which said assignment of said lease is in words and figures following, to wit:

Know all men by these presents that the Welch Coal Mining Company, a corporation organized and existing under the laws of the State of Colorado, for and in consideration of the sum of $1 in hand paid by the Union Coal Company, a corporation organized and existing under the laws of the State of Colorado, have sold and by these presents do grant, convey, assign, transfer, and set over unto the said Union Coal Company a certain indenture of lease
40 filed for record in the office of the recorder of Boulder county, State of Colorado, on the 30th day of August, A. D. 1879, and recorded in Book 37, on page 499, the same bearing date on the first day of November, 1878, made by Charles C. Welch, of Jefferson county, Colorado, to the said Welch Coal Mining Company, of the right and privileges to work and operate all the coal mines and veins of coal heretofore discovered and opened, and to prospect for and open the same in and upon the following-described lands, situate in the county of Boulder and State of Colorado, to wit:

The N. E. ¼ of the S. E. ¼ of sec. 8; also the S. W. ¼ and the N. W. ¼ and the N. ½ of the N. E. ¼ and the S. E. ¼ N. E. ¼ and the N. W. ¼ of the S. E. ¼ of sec. 9, all in township one south, of range 69 west, and, excepting the said tract of land in section 8, all such surface rig[illegible] may be necessary for building or building purposes, for pr[illegible] for coal, with all and singular the premises and rights [illegible]mentioned:

To have and to hold the same unto the said Union Coal Company, its representatives and assigns, from the date hereof for and during all the rest, residue, and remainder of the term of said lease, subject to the rents, covenants, and conditions therein mentioned; and the said Welch Coal Mining Company does hereby covenant with the said Union Coal Company that the said assigned premises are free and clear of all former and other gifts, grants, bargains, sales, leases, and incumbrances whatsoever.

In witness whereof the said Welch Coal Mining Company has

caused these presents to be signed and acknowledged by its president, with the seal of said company attached.

[SEAL.] (Signed) S. H. H. CLARK, *President.*

In the presence of—
G. M. CUMMING.

41 This defendant, further answering, says that on the 13th day of October, 1885, the Marshall Consolidated Coal Mining Company of Colorado was a corporation organized and existing under the laws of the State of Colorado and had become the owner by purchase of all of the coal lands formerly owned by Augustine G. Langford and others and were under the name of the Marshall Coal Mining Company; that the Union Coal Company was at that time interest- in coal mines situate at Erie, in Weld county, the Louisville mines, and other mines in said Boulder county; that The Union Pacific Railway Company, this defendant, was at that time the owner of a large portion of the capital stock of said company and controlled the operations of the said Union Coal Company; that it had acquired the said stock for the purpose of obtaining coal for its own consumption on its locomotives in the said State of Colorado and elsewhere.

That at said date, on account of the complaints that had theretofore been made by the owners of the Marshall Coal Mining Company and the owners of other mines in Boulder county, this defendant concluded that it was for the best interest of the said Union Pacific Railway Company to discontinue its connections with the said Union Coal Company and to discontinue the actual working of any mines through said company; that thereupon and for that purpose it entered into negotiations with the said Marshall Consolidated Coal Mining Company for the purpose of procuring the said company to take off its hands or off the hands of the Union Coal Company, controlled and operated by it, the said mines as above stated, and that it was further induced to make said contract from the fact that the former owners of the Marshall coal mine had always been complaining of the rates and giving to the defendant great trouble

42 and annoyance in respects to said complaints about said rates; that it was further induced to enter into said contract for the reason that said Marshall Consolidated Coal Mining Company had succeeded to the rights of the former owners of the Marshall coal mine, together with the right to demand of the Denver, Western and Pacific Railway Company or its assignees damages as were claimed at that time, the said lands of the Denver, Western and Pacific having already at that time been conveyed to the Denver, Marshall and Boulder Railway Company subject to said claim, and therefore, for the purpose both of getting rid of the operation of said mines formerly operated by the Union Coal Company and for the purpose of providing this defendant with some source upon which it could rely for the coal needed by it for consumption on its locomotive-, and for the further purpose of settling the said claim so made by the former owners of the said Marshall Coal Mining Company and assigned to the Marshall Consolidated Coal Mining

Company, it made and entered into an agreement in words and figures following, to wit:

This contract, made this thirteenth day of October, 1885, between the Union Pacific Railway Company (a corporation organized and existing under the laws of the United States), of the first part, hereinafter designated as the "railway company," and the Marshall Consolidated Coal Mining Company of Colorado (a corporation organized and existing under the laws of Colorado), of the second part, hereinafter designated as "the coal company," witnesseth as follows:

Whereas the Union Coal Company of Colorado is the owner, lessee, or otherwise interested in the coal mines known as the Boulder Valley mines, situate at Erie, Weld county, Colorado, and the Northrup mine, so called, one and one-half miles west of
43 Erie, in said Weld county, on lands originally owned by the Denver Pacific Railway & Telegraph Company; and

Whereas it is the lessee of a coal mine known and designated as the Welch mine, situate at Louisville, Boulder county, Colorado, on the Colorado Central railroad, under a lease executed by Charles G. Welch, of the Welch Mining Company, dated November 1st, 1878; and

Whereas the Union Pacific Railway Company is the owner of the capital stock of the Union Coal Company and has heretofore controlled and operated said mines; and

Whereas it is for the interest of the Union Pacific Railway Company and Union Coal Company to discontinue the actual working of the said mines and contract with said coal company to furnish said railway company any and all coal which said railway company may use for its consumption and for the consumption of its branches, connections, and railways owned, operated, managed, or otherwise controlled by said railway company, not to exceed fifty thousand (50,000) tons per annum the first year and one hundred thousand (100,000) tons per annum for the second year and every year thereafter:

Therefore, in consideration of the mutual advantages to accrue to the respective parties to the said contract and the sum of one dollar ($1.00) paid by each to the other, it is hereby mutually agreed as follows:

In consideration of the said railway company and the said Union Coal Company going out of the business of mining coal in the counties of Boulder and Weld, in the State of Colorado, and the purchase of coal used by it for its own consumption of the said coal company at the rate herein agreed on, and in consideration of the rates for the transportation of coal herein agreed on by said railway
44 company, the said coal company agrees to furnish from its mines to be hereafter acquire-, now known as the "Marshall mines," all coal ordered by the said railway company for its own use or consumption and for the consumption and use of its branches and connections owned, operated, managed, or otherwise controlled by the said railway company; such amount, however, not to exceed

fifty thousand (50,000) tons per annum for the first year and one hundred thousand (100,000) tons per annum thereafter.

Said coal to be delivered loaded on the cars at the mouth of the mines at the actual cost per ton of mining and loading the same, but in no case to exceed the cost of one dollar and twenty-five cents per ton, delivered and loaded on the cars as aforesaid.

Said coal so to be delivered to be pure, well-screened coal, free from slate and other foreign and refuse substances; all settlements and payments to be made monthly between the parties.

It is further stipulated and agreed that the said coal company shall transport all coal mined by it in the counties of Weld and Boulder, other than such as is delivered by it to the Union Pacific Railway Company for its own use, over the lines of the Union Pacific Railway Company, its branches and connections from Denver, including and comprising all railways owned, managed, operated, or otherwise controlled either directly or indirectly by the said Union Pacific Railway Company so long as the rates do not exceed those charged by competing railway companies.

It is further stipulated and agreed that the said Union Pacific Railway Company shall give to said Marshall Consolidated Coal Mining Company for the transportation of coal mined from above mines over the Union Pacific railway, its branches and connections from said mine to Denver, the regular tariff rate not exceeding one dollar per ton unless two hundred thousand tons shall be mined and furnished for transportation from said Marshall Consolidated Coal Mining Company's mines in Colorado and transported over said railway company's lines yearly, in which case a rate of sixty cents per ton shall be given for all coal transported: Provided that in case the tariff rate shall be reduced by said railway company below one dollar per ton during the period of said reduction the rate to said coal company shall be reduced in like ration.

It is further agreed that the said railway company shall furnish at all times a supply of cars at the mines aforesaid so that there shall be no delay in loading and transporting coal as fast as the same shall be mined by said company.

It not being intended, however, to include delays resulting from accidents or providential or other causes beyond the control of the said railway company; the said railway company shall also erect and maintain at their own expense all the necessary side tracks and switches for the purpose of loading and transporting coal both at the said mine and the city of Denver, and shall, within a reasonable time and without unnecessary delay, build and extend the track of the Denver, Western and Pacific railway, now known as the "Denver, Marshall & Boulder railway," to the said mines, and have the same in running order from Denver to the said Marshall coal mines.

Said mines shall at all times be kept accessible for the examination of the said railway company or any person whom it may designate for examining into the condition, management, working, and operation of the same, and the foregoing shall be deemed to include the

book- of account and records of the proceedings of said coal company and of its business.

46 It is further contracted and agreed that for the purpose of ascertaining and fixing the weight of the coal to be delivered by the said coal company to the said railway company, as heretofore provided, the said railway company may at any time demand that said coal be weighed upon the cars upon its own scales and by its own agents at the mines, and if any differences shall arise in respect to the weights and measurements or in respect to any other matters covered and included by said contract the same shall be settled by a board of arbitration, to be organized at the instance of either party, as hereinafter provided.

The party demanding arbitration shall serve upon each of the other parties to said proposed contract whose interest may be affected by the decision a written notice of such demand and the name of one disinterested party chosen by the demandant for arbitrator. The other parties notified shall each within ten days after receiving such notice select a disinterested person as arbitrator and shall notify the other parties of such selection. If any party notified shall neglect or refuse to select an arbitrator within — days of receiving such notice, the arbitrator or arbitrators chosen shall select the number necessary to give the parties interested each an arbitrator in said board, and in case such selection shall consist of an even number the board thus constituted shall select an additional arbitrator. The arbitrators so chosen shall fix the time and place for hearing if requested by either party and shall give to the parties interested reasonable notice thereof. At the time and place named they shall proceed with the hearing. If a majority of the arbitrators shall agree upon an award and shall reduce the same to

47 writing, it shall be binding and conclusive upon all the parties who joined in the arbitration from the date of the delivery of a copy of such award or decision to each of the parties to the arbitration and shall be enforced accordingly.

It is further contracted and agreed that in case the said Union Pacific Railway Company shall order coal in excess of the amount hereinbefore stipulated for for commercial uses or uses other than hereinbefore specified of the said coal company said orders shall be filled from said Marshall mines without unreasonable delay, and the price to be paid for all coal furnished on such orders shall be the cost of mining and delivery of the same on board the cars at the mouth of the mines plus fifty cents per ton, but with this limitation—namely, that in no case shall the cost to said railway company of such coal upon the cars at the mine exceed one dollar and forty cents per ton; provided no orders for such commercial uses shall be made for coal to be sold except of the main line of the Union Pacific railway and lines owned, leased, and operated, or otherwise controlled by said company north of Greeley, Colorado. This exception is not to exclude any lines in Utah or any mines in Nebraska reached by branches and connections from the main line in Nebraska, although the same or some branch thereof may be situated south of Greeley.

It is further contracted and agreed by and on the part of the said coal company as a part of the consideration of this contract that a majority of the capital stock of said Marshall Consolidated Coal Mining Company shall for a period of two years from the date of this contract be held in case the company shall desire to sell and shall offer the same for sale, be first offered to said railway
48 company at the price bid therefor by any responsible purchaser, and that the said railway company shall have the option of taking the same at such price during the said period of two years in preference to any other purchaser.

It is hereby understood and agreed by and between the parties to this contract that if either party, after the execution of this contract, is temporarily unable to perform his part of the said contract on account of strikes by laborers, miners, and others employed by either, that during such strikes neither party shall be held by the other to the terms of said contract, but shall conform as nearly to the same as circumstances shall permit.

It is further contracted and agreed that said coal company shall pay for all machinery taken from Erie, Northrup, and Louisville mines a reasonable compensation, to be determined in case of difference by arbitration, and said coal company shall take all machinery from said mines available for its use.

This contract shall be and remain in force for a period of five (5) years from the signing thereof.

In witness thereof the respective corporations parties hereto have caused these presents to be signed by their respective presidents and secretaries and their respective corporate seals to be hereunto attached the day and year first above written.

UNION PACIFIC RAILWAY CO.,
[SEAL.] By CHAS. F. ADAMS, JR., *President.*

Attest: HENRY McFARLAND, *Secretary.*

THE MARSHALL CONSOLIDATED COAL MINING CO.
[SEAL.] J. F. CHAFFEE, *President.*

Attest: GEO. C. LYMAN, *Secretary.*

49 This defendant, further answering, says that said contract and the negotiations leading thereto *was* mainly made by and between Charles F. Adams, Jr., its president, and J. B. Chaffee, president of the Marshall Consolidated Coal Mining Company, and was the subject of correspondence between them; that from the fact that the said Charles F. Adams was not intimately acquainted with the facts hereinbefore set forth as to the claim for damages made by the said former owners of the Marshall Coal Mining Company, and also held by the Marshall Consolidated Coal Mining Company against this defendant, the said contract failed to mention anything about the said settlement of said claim; that the said contract, upon being signed by the said Charles F. Adams, president, and by the said J. B. Chaffee, president of the Marshall Consolidated

Coal Mining Company, was sent forward to A. J. Poppleton, Esq., the attorney for the said defendant, with instructions to look over the same, and, if anything further was needed to settle the controversy between said companies that might grow out of anything theretofore existing between the owners of the said Marshall coal mine and this defendant, that it should be provided for in a separate instrument and submitted to the Marshall Consolidated Coal Mining Company, and that, upon the approval of the said A. J. Poppleton, the said contract should be delivered to the said Marshall Consolidated Coal Mining Company, and thereupon the said A. J. Poppleton, being well acquainted with the facts in respect to the litigation theretofore existing against the said Denver, Western and Pacific Railway Company on account of the damages as aforesaid, and well knowing that the same was a lien upon the property of the said Denver, Western and Pacific Railway Company, and knowing that the right of way for the said Denver, Marshall and Boulder
50 Railway Company had not been settled for or obtained over said lands, prepared the following instrument in writing, to wit:

Know all men by these presents that the Marshall Consolidated Coal Mining Company of Colorado, as principal, and J. B. Chaffee and David H. Moffatt, as sureties, are held and firmly bound unto the Union Pacific Railway Company in the penal sum of ten thousand dollars, well and truly to be paid to the said railway company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, firmly by these presents.

Signed and sealed this 29th day of October, A. D. 1885.

The obligation, however, is upon the following conditions, namely:

Whereas the Union Pacific Railway Company has contracted with the said Marshall Consolidated Coal Mining Company of Colorado for the delivery to the said railway company of certain coal, as in said contract of even date herewith set forth between the said parties; and

Whereas the said Union Pacific Railway Company and the Union Coal Company hold a certain mine known as the "Welch mine" under a lease executed by Charles C. Welch, of the Welch Mining Company, dated November 1st, 1878; and

Whereas there are outstanding against the Denver, Western & Pacific Railway Company and its successors, the Denver, Marshall & Boulder Railway Company, certain claims for damages resulting to the so-called Marshall mines by reason of the location and construction of the Denver, Western and Pacific railroad through and over the said so-called Marshall mine; and

51 Whereas it was a part of the consideration of said contract that the said Marshall Consolidated Coal Mining Company should indemnify and hold harmless the Union Pacific Railway Company, the Denver, Western and Pacific Railway Company, and its successors, the Denver, Marshall and Boulder Railway Company, against all claims and demands of any character and description

against any and either of the said parties for damages by reason of the location and construction of the railways of any of the said companies through or over the lands upon which the so-called "Marshall mines" are situated and the said mines themselves, and should also indemnify and hold harmless the said Union Pacific Railway Company against any damages which might accrue to it by reason of conveying the lease of the said Welch mine to the said Consolidated Coal Mining Company and the delivery of the possession thereof to the said company and the working thereof by the said company:

Now, therefore, if the said Marshall Consolidated Coal Mining Company of Colorado shall indemnify and hold harmless the said Union Pacific Railway Company, the said Denver, Western and Pacific Railway Company, and the Denver, Marshall and Boulder Railway Company against all loss and damages or claims or demands of any kind whatever accruing to any or either of them, said parties, by reason of the matters hereinbefore stated and set forth, and especially against all claims for damages by reason of the location, construction, and operation of the railway or railways over, through, and upon said so-called "Marshall mines" and the property appurtenant thereto, and by reason of the transfer of said Welch mine to the said Marshall Consolidated Coal Mining Company, and of the delivery to the said Marshall Consolidated Coal
52 Mining Company of the possession of the said Welch mine and its occupation and the working and use thereof or non-working or use thereof by the said Welch Coal Mining Company, then this obligation to be void; otherwise in full force and effect.

MARSHALL CONSOLIDATED COAL MINING CO.,
By J. B. CHAFFEE, *President.*

Attest: GEO. C. LYMAN, *Secretary.*

J. B. CHAFFEE,
D. H. MOFFATT, *Sureties.*

Which said instrument was thereupon presented to Jerome B Chaffee, the president of the said Marshall Consolidated Coal Mining Company, as a part and parcel of and to accompany the said contract of October 13th, 1885, and thereupon the said J. B. Chaffee, as president of said Marshall Consolidated Coal Mining Company, executed the same, and the same was thereupon submitted to this defendant, and thereupon the contract of October 13th, 1885, was delivered to said Marshall Consolidated Coal Mining Company and became effective between said parties; and afterwards, at request of the said Marshall Consolidated Mining Company, the said former owners of the said Marshall mine, the said Marshall Coal Mining Company, Augustine G. Langford, and Joseph M. Marshall executed unto the Union Pacific Railway Company and the Denver, Marshall and Boulder Railway Company a receipt in full discharging the said Union Pacific Railway Company and the Denver, Marshall and Boulder Railway Company, its successors and

assigns, from all suits, actions, and causes of actions existing for or by reason of any matter or anything pertaining to the construction of the Denver, Western and Pacific Railway Company.

53 This defendant further says that the sole and only variation from the schedule rates made by this defendant in respect to the carriage of coal by any parties over the Denver, Marshall and Boulder Valley road is that made by and between this defendant to the said Marshall Consolidated Coal Mining Company, and that it was made for the reasons above given and for no other reasons whatever.

And this defendant says it is informed and believes that it costs to the said Marshall Consolidated Coal Mining Company, and would have cost to this defendant had it continued to mine the Louisville mine through the Union Coal Company, the sum of at least $1 60 per ton to mine coal from the said Marshall Consolidated Company's mine and to get the same in cars upon the track as provided for in this contract, and that it would have cost this defendant the same to mine from the Louisville and Erie mines had it continued to mine for its own use in said mines.

And this defendant further says that on account of the settlement of the claims made against it by the said Marshall Consolidated Mining Company, which said claims were settled and provided for in the said contract above set forth, and on account of the coal necessarily used by it, the defendant, and furnished to it by the said Marshall Consolidated Coal Mining Company under the terms of the contract above set forth, the said Marshall Consolidated Mining Company have paid to this defendant and this defendant has received of the Marshall Consolidated Coal Mining Company a higher rate as a matter of fact than $1.00 per ton, although it was not intended that the rate should exceed the schedule price; that at the time of the making of said contract it was believed that the price at which the coal was to be furnished to this defendant for its use on locomotives, and on account of the settlement of the claims as

54 aforesaid, and on account of the benefits accruing to this defendant by reason of the Marshall Consolidated Mining Company taking and operating the said Louisville and Erie mines, this defendant would receive from the said Marshall Consolidated Coal Mining Company for the said period of five years, during which said contract was to operate, the same price as that fixed in the schedule price.

This defendant further says that the price fixed in the schedule rates for $1.00 per ton for transportation from Marshall to Erie coal beds was a fair and reasonable price for the carriage of said coal over said line; that the length of line was about thirty miles, and that on account of the length of time in which the cars are necessarily delayed in loading and unloading the price so fixed for carriage over said thirty miles was fair and reasonable and was in no manner exorbitant.

TELLER & ORAHOOD,
Attorneys for Defendant.

(Indorsed:) No. 2236. U. S. C. C., dist. of Colo. E. R. Taggart *vs.* The Union Pacific Railway Company. Answer. Filed May 25, 1888. William A. Willard, clerk. Teller & Orahood, def't'- att'ys.

55 And afterwards and on, to wit, the 17th day of November, A. D. 1888, came again the said plaintiff, by his attorneys aforesaid, and filed in said court and in said cause his demurrer to the second answer to the complaint heretofore filed herein, and the said demurrer is in words and figures as follows, to wit:

Demurrer to Second Answer.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of the Eighth Judicial Circuit in and for said District.

E. R. TAGGART, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY CO., Defendant.

Comes now the plaintiff, by Patterson & Thomas, his attorneys, and demurs to the second and further answer of the defendant, and says the same is wholly insufficient for the plaintiff to reply to; that the same does not state facts sufficient to constitute a defense to the plaintiff's cause of action, and constitutes no justification to the defendant for the acts and things charged against it in said complaint.

And also for that the said defendant cannot justify its discriminations in favor of the Marshall Consolidated Coal Mining Company and against this plaintiff, upon the plea that by so doing it satisfied and paid certain unliquidated claims for damages
56 held by said coal company against its grantors or against itself.

Wherefore he prays judgment, &c.

PATTERSON & THOMAS,
Attorneys for Plaintiff.

(Indorsed:) No. 2236. E. R. Taggart *v.* The Union Pacific Railway Company. Demurrer to the 2nd answer. Filed Nov. 17, 1888. William A. Willard, clerk. Patterson & Thomas, att'ys for pl'ff.

And afterwards and on, to wit, the 13th day of February, A. D. 1889, the same being one of the regular juridical days of the November term, A. D. 1888, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

57 *Order: Demurrer to Answer Sustained.*

E. R. TAGGART
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2236. Action for Damages.

At this day comes the said plaintiff, by C. S. Thomas, Esq., his attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

And the demurrer to the second answer of the said defendant having heretofore come on to be heard and having been submitted to the court and taken under advisement by the court, and the court being now sufficiently advised in the premises, it seemeth to the court now here that the said second answer is not sufficient in law, and so the said demurrer is sustained.

And afterwards and on, to wit, the 5th day of March, A. D. 1889, came again the said defendant, by its attorneys aforesaid, and filed in said court and in said cause a plea of statute limitations; and the said plea is in words and figures as follows, to wit:

Plea of Statute Limitations.

In the Circuit Court of the United States, District of Colorado.

E. R. TAGGART, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

58 Now comes the said defendant herein and for a third division and answer herein says:

The causes of action herein did not (nor did either of them) accrue to the said plaintiff within one year from the time of the commencement of this suit, and the same and every part is and are barred by the statute of limitations in such case made and provided.

TELLER & ORAHOOD,
Attorneys for Defendant.

(Indorsed:) No. 2236. E. R. Taggart *vs.* The U. P. R'y Co. Plea statute lim. Filed Mar. 5, 1889. William A. Willard, clerk. Teller & Orahood, att'ys for def't, Denver, Colo.

And afterwards and on, to wit, the 25th day of May, came again the said plaintiff, by his attorneys aforesaid, and filed in said court and in said cause his replication to the plea of statute of limitations heretofore filed herein, and the said replication is in words and figures as follows, to wit:

Replication to Plea.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States in and for said District.

59 E. R. TAGGART, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

The plaintiff in the above cause, replying to the third defence of the defendant in this cause, says that he denies that the cause of action herein did not accrue unto the plaintiff within one year from the time of the commencement of the suit herein; and he denies that the same or any part thereof is barred by the statute of limitations in such case made and provided.

And for a second reply to said answer the plaintiff says that the said defendant deliberately and wilfully concealed from the plaintiff its unlawful and unjust discrimination in favor of the said Marshall Coal Mining Company against this plaintiff, and that the said action was brought within one year from the time when he acquired knowledge of the existence thereof.

PATTERSON & THOMAS,
Plaintiff's Attorneys.

(Indorsed:) No. 2236. E. R. Taggart *vs.* U. P. R. W. Co. Replication. Filed May 25, 1889. William A. Willard, clerk. Patterson & Thomas.

And afterwards and on, to wit, the 29th day of May, A. D. 1889, the same being one of the regular juridical days of the May term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

60 *Order: Trial; Verdict for Plaintiff.*

E. R. TAGGART
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2236. Action for Damages.

At this day comes the said plaintiff, by C. S. Thomas, Esq., his attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes; and thereupon comes a jury, to wit, F. C. Jones, William Kimball, Joshua S. Lesher, T. J. Shandel, Milton H. Dayton, V. Divinney, Nicholas Ennis, H. H. Suttle, H. W. Hallett, John Q. Day, Alonzo D. Like, J. C. Dedisse, twelve good and lawful men, and they are duly selected and tried, impaneled, and sworn to well and truly try the issues herein joined and a true verdict render according to the evidence; and thereupon comes the evidence.

And during the trial on this day John C. Dedisse, one of the said jurors sitting in this cause, comes and informs the court that he is sick and unable to longer sit as a juror, and the counsel for the parties to this cause, being advised in the matter, stipulate that the said juror be discharged from further service in this cause and agree that the trial may and shall proceed to verdict with the said eleven jurors remaining.

And thereupon it is considered by the court that the said Dedisse be discharged from further service as a juror in the trial of this cause.

And said remaining jurors, having heard the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn bailiff to consider of their verdict.

61 And afterwards and on this day came again the said jurors and on their oaths do say they find for plaintiff in the sum of nine thousand four hundred and thirty seven $\frac{20}{100}$ dollars, being forty cents per ton upon 23,593 tons.

And afterwards and on, to wit, the 6th day of July, A. D. 1889, the same being one of the regular juridical days of the May term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Motion for New Trial Overruled, etc.

E. R. TAGGART
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2236. Action for Damages.

At this day comes the said plaintiff, by C. S. Thomas, Esq., his attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

And the motion of the said defendant for a new trial herein, coming on now to be heard, is submitted to the court, and, the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Wherefore it is considered by the court that judgment be entered upon the verdict of the jury herein in favor of the said plaintiff and against the said defendant for the said sum of nine thousand four hundred and thirty-seven dollars and twenty cents ($9,437.20) and the said plaintiff's costs, to be taxed.

62 And thereupon day until ninety days from this day is allowed the said defendant, within which time to file the bill of the exceptions reserved by it upon the trial of the issues herein joined.

And supersedeas bond upon writ of error to the Supreme Court shall be in — thirteen thousand dollars ($13,000.00).

And thereupon and on the same day, to wit, the 6th day of July A. D. 1889, judgment was duly entered on the judgment book of said court in said cause in pursuance to the statute and rules of court in words and figures as follows, to wit:

Judgment.

E. R. TAGGART
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2236. Action for Damages.

On this 6th day of July, A. D. 1889, the same being one of the regular juridical days of the May term, A. D. 1889, of said court, there being present the Honorable Moses Hallett, district judge—

It is considered by the court that the said plaintiff do have and recover of and from the said defendant nine thousand four hundred and thirty-seven dollars and twenty cents ($9,437.20), his damages by occasion of the premises in his complaint mentioned, in form aforesaid assessed, and his costs by him in this behalf laid out and expended, to be taxed, and have execution therefor.

63 And afterwards and on, to wit, the 2d day of October, A. D. 1889, came again the said defendant, by its attorneys aforesaid, and filed in said court and in said cause its bill of the exceptions reserved by it upon the trial of this cause and its bond on writ of error, and sued out of said court a writ of error and a citation to the Supreme Court of the United States; and the said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

64 In the Circuit Court of the United States, District of Colorado.

E. R. TAGGART, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. }

Be it remembered that on the 29th day of May, 1889, this cause coming on to be heard before a jury, the plaintiff, to maintain the issues on his behalf, called as a witness E. R. Taggart, who, being first duly sworn, gave evidence showing that he resided in Denver and has been engaged in the coal trade for seven years, and that he had been handling and selling the output of the Fox Coal Company from November, 1875, to the time of the beginning of this suit continuously, purchasing the coal at the mine and paying the freight from the mine, a few miles back of Boulder, at Marshall station, and on the same vein as the Marshall, and on one of the branches of defendant's road. There are two branches, both belonging to the defendant, and there is no other way of shipping, except over one of these branches.

That he knows the Marshall Consolidated Coal Company, and that said company and plaintiff ship their coal from the same station,

and were doing so from the month of November, 1885, until the time this suit was brought, and that plaintiff paid $1.00 per ton during that time, and that he shipped during that time 23,593 tons up to the latter end of July, 1885. Witness then gave the amounts
65 for all of the months, and stated that for all this amount he paid $1.00 per ton freight to defendant, and that at the rate of 40 cents per ton it amounted to $9,437.20, and that the defendant rendered its bills to the agent of the Marshall Consolidated Coal Company at $1.00 per ton and paid back to said last-mentioned company 40 cents per ton, and that the first official notice plaintiff had of the rebate was when the commission appointed to investigate defendant's affairs was here; that thereupon he wrote to the president of defendant, and also to T. L. Kimball, who was the general traffic manager and official head of defendant.

Plaintiff here offered in evidence plaintiff's letter to T. L. Kimball and Kimball's reply, to which defendant's attorneys objected, since the demurrer to the second answer had been sustained; any statement of the way in which the defendant has acted relating to that defense shall be excluded because immaterial, irrelevant, and incompetent; which objection was by the court overruled and defendant then and there excepted.

The letters were then read as follows:

"DENVER, COL., *Aug.* 20, 1887.

Thos. L. Kimball, U. P. R. R.

MY D'R S'R: I have carefully considered the contents of your f'v'r dated 18 inst., and in reply thereto beg to say that I am quite unwilling to concur in the reasons assigned for refusing the return of 40c. per ton from the beginning to the ending of your contract with the Marshall people. The conditions of shipment are identical in every respect, and information from the very highest legal sources here assure- me that the contract in question was without warrant and clearly in violation of law. Of the principle which is ad-
66 vanced to sustain your position should obtain what is to hinder you from making a rebate large enough to bankrupt every coal mine in northern Colorado aside from the Marshall? Moreover, I fail to perceive any justice or equity which will compel me to share in your loss by reason of the compromise and settlement to which you refer. My shipments from the Fox mine or Marshall for the period embraced in my claim aggregate some 2,000 cars. Your freight bills without a single exception have always been promptly paid on presentation, and all I ask is to be paid back the difference between rates of the Marshall and Fox mines to Denver alone.

It only remains to add that I am disposed to concede a reasonable time for you to maturely consider my demand before taking steps to legally enforce it; hence shall be pleased to hear from you on or before the 1 proximo.

(Signed) E. R. T."

"OMAHA, *Aug.* 18, 1887.

E. R. Taggart, Esq., care Fox Mining Co., Denver, Colo.

DEAR SIR: Vice-President Potter has handed me a communication from yourself to our president, dated the 1st instant, with request that I reply to it, as it relates to a matter with which he is not personally familiar.

As the Marshall contract to which you refer was made under circumstances entirely dissimilar to those existing between the Fox Company and the Union Pacific, neither General Manager
67 Callaway nor President Adams supposed they were making an illegal or unjustly discriminating agreement against your company when it was executed.

It is my impression that the allowance of forty cents per ton referred to on Marshall coal was limited to its Denver deliveries, and was made in consideration of the Marshall Company's agreement to furnish our company coal for its own use at not exceeding $1.25 per ton, which was then costing us about $1.50 per ton to mine, and commercial coal at not exceeding $1.40 per ton at a time when other producers of coal asked us $1.60 and upwards.

Another important consideration and inducement to make this contract was the compromise and settlement of a claim against our company of some sixty-odd thousand dollars. Under these circumstances I fail to see any good ground for your claim.

In respect to your charge that you had been discriminated against in the supply of empties I have no information, and can only say it is denied by our operating department, and that no orders to that effect were ever given by the management of this company.

Yours truly,

(Signed) THOS. L. KIMBALL.
G. T. M."

68 And, further, that the commission spoken of was here in June or July, 1887; that before that time he had inquired for the purpose of finding out what arrangement did exist between the defendant and the Marshall Company from the only source he could hear of—from the collector of defendant's bills; that the name of such collector was Spanger, and he was its regular collector; and, further, that he not only made inquiries of the said collector, but witness himself occasionally received the bills himself of the Marshall Company by mistake, and the bills were $1.00, the same as his own.

The attorney for plaintiffs then asks: "Did you get any information from this collector?" To which attorney for defendant objected, and plaintiff's attorney proceeded:

Q. You need not state what he said; state whether you got any information from him on this subject.

A. No satisfactory information.

Objection.—It seems to me to follow logically if this agent was not an agent to make declarations he cannot bind us by his refusal.

The COURT: This is a question of diligence on the part of the plaintiff to ascertain the facts; certainly there is no objection to his stating whether he made inquiry or whether he obtained information.

Mr. TELLER: He is trying to make out that we concealed the fact. Now, concealment of that kind must be an affirmative act. He has undertaken to show this man made declarations. It follows logically, if a man's declarations is an evidence in respect to whether we have concealed or not, his refusal—consequently that is inadmissible.

69 The COURT: I think he is entitled to say whether he got any information from him upon this subject.

Mr. Teller excepts and says: "I don't think he is such an agent as that he can bind the company either by affirmative acts or declarations or failure to act or declare."

Q. Was this collector of whom you spoke the collector of the company from all the coal dealers?

A. Yes, sir.

Q. State whether you ever made any inquiry from any agents of the Marshall Consolidated Coal Company as to their rates during this time.

A. No; there were others shipping who like myself were paying a dollar.

70 That there were also repeated efforts made by other shippers, and that he made inquiry of the collector, who had just about as much authority as any of the rest, and that he (plaintiff) made no inquiries of the officers or agents of the Marshall Company about the rebate.

(By plaintiff's attorney:)

Q. "Had you any knowledge of the existence of this special rate to the Marshall Company prior to the disclosures before the commission?"

To which defendant's attorney objected because it is immaterial and incompetent; which objection was by the court overruled, and defendant, by its attorney, then and there excepted, and the witness answered:

A. "I knew nothing about the rebate they were getting until disclosed by the commission," and that his letter was written to defendant's officer as soon as he returned to town immediately after the sitting of the commission, and that he knew of two other coal dealers making inquiries as to the rates had by the Marshall Company.

On cross-examination the witness gave evidence tending to show that in 1882, when he commenced dealing in coal from the Fox mines, his business had been increasing—supposed it had increased 25 per cent.—and that during the first two years he shipped several thousand tons of coal over defendant's road, paying $1.25 per ton for a period of that time and the rest of the time

$1.00 per ton; paid $1.25 for perhaps a year, and that the rates paid by him during that time were the same as paid by everybody else, and that there was nothing exceptional, to witness' knowledge, about the $1.25 per ton rate; that he (witness) continued to ship coal at $1.00 per ton from 1882 up to 1887 and paid $1.00 per ton from the Fox mine and knew no company or person that got a less
rate than $1.00 per ton, except the Marshall Company, and
71 knew that defendant set up in bar of plaintiff's claim a contract they had with the Marshall Company in consideration of the Marshall Company supplying them with coal at a given price—much below the price at which they could mine it or get it out of the mines—and, further, in settlement of an old lawsuit they had, and that witness protested against that sort of business, and that witness never heard that the amount of coal thus to be furnished was a stipulated amount, and that witness knew nothing about it, except what Mr. Kimball said in his testimony before the congressional committee, and that what said Kimball did say was "it is my impression that the allowance of 40 cents on Marshall coal is limited to its Denver delivery made in consideration of the agreement of the Marshall Company to furnish our company coal for its own use." The witness further gave testimony showing that Kimball's testimony as to its own uses and not exceeding $1.25 per ton, which was then costing plaintiff and others about $1.50 to mine, and commercial coal at not exceeding $1.40 per ton at a time when other producers asked $1.60 per ton—that was making a difference of from 20 to 25 cents per ton on every ton of coal less than what it cost.

Defendant's counsel here asked: "As a matter of fact, do you know what it did cost to get out a ton of coal and put it on the cars at the Marshall or Fox mine?"

To which plaintiff, by his counsel, objected. The defendant's counsel claimed that the good faith of the company in making the contract with the Marshall Company was in question; but the court sustained the objection, and the defendant, by its counsel, then and there excepted.

The witness also gave evidence tending to show that he knew all parties shipping coal to Denver at that time, from 1882 to 1885;
knew no other rates than that of the $1.00 and the $1.25 per
72 ton before mentioned, and that from 1882 to 1885 there was no trouble between plaintiff and defendant about rates, and that his reason for commencing suit was what was disclosed before the congressional commission, and that his sole claim was founded on the fact that the defendant had made a distinction between witness and the Marshall Company, and that he (witness) did not think the defendant had acted in good faith with him in giving a 60-cent rate to the Marshall Company and charging him $1.00, and that it deprived him of profits, and he lost the sale of a large number of cars of coal, and that in the judgment of the witness the defendant's defense, consisting of a contract with the reasons alleged for the contract, was not satisfactory to him, and that was the reason why he brought suit to recover back the 40 cents per ton. The witness also stated that his reasons for bringing suit were contained in his letter of

July 25th, 1887, to Charles Francis Adams, and thereupon the letter was read, as follows:

"DENVER, *July 25th*, 1887.

Honorable Charles Francis Adams, president Union Pacific railroad, Boston, Mass.

MY DEAR SIR: The recent investigation *of* this city of the U. P. commission has disclosed the fact that your company have continuously allowed a rebate to the Marshall Consolidated Mining Company from November, 1885, to the present time. I represent and purchase my coal from the Fox Mining Company, which has property and operations immediately adjoining that of the Marshall. The conditions of shipment are identical in every respect; it is not a competing point; your two branches control the output from the Marshall station, and I am advised by the most competent legal authority here that such rebates and discriminations are wholly unlawful if ex-
73 ercised to my pecuniary disadvantage, which certainly has been the case. In this view I respectfully demand of the Union Pacific railroad the full amount of such rebates as have been awarded to the Marshall Consolidated Coal Mining Company for the period above stated, and further beg to notify you that I shall hereafter — transported at the same rate as that of the Marshall Consolidated Coal Mining Company. My receipts embracing the period *about* stated aggregate over two thousand cars. I trust you will realize the justice of my claim and take such immediate action in the premises as will avoid litigation. I beg only to add that for a satisfactory adjustment of my claim I am willing to waive any additional demands by reason of a failure in the supply of cars. It is due to truth to say that my sales would have been augmented to the extent of five hundred — or an equitable division had been made between the companies.

A prompt answer is respectfully solicited."

The plaintiff further introduced ROBERT H. RUBIDGE as a witness, who, having been duly sworn, gave evidence tending to show that he had been the treasurer and assistant secretary of the Marshall Consolidated Coal Mining Company since November, 1885, the date of its organization.

The witness was then asked if he could state the amount of coal shipped by the Marshall Company to Denver between November 1st, 1885, and August 1st, 1887, and, having said he could, was asked to state that amount.

To which defendant's counsel objected that it was incompetent and immaterial.

The court, thereupon remarking that plaintiff was bound
74 to show that the Marshall Company was a competitive dealer and his right to recover was on the ground that there was an unjust discrimination, overruled the objection; to which defendant, by its counsel, then and there excepted.

And witness stated that from November 1st, 1885, to May 1st, 1887, which was all he could give, there was shipped from the Mar-

shall mine 79,970 tons and from the Louisville mine 73,067 tons of coal, and that each of these places are about the same distance from Denver on defendant's road; that the amount of coal shipped from May 1st, 1887, to August 1st, 1887, would be small, say something like 3,000 tons per month, and that there was shipped to Denver from November 1st, 1885, to August 1st, 1887, 67,863 tons from the Marshall mine. The balance was shipped to other places. The freight on this amount to Denver was $1.00 per ton, and the bills were made out and presented at that rate, and 40 cents per ton was paid back to the Marshall Company. The amount of money then paid back up to August, 1887, was $27,145.33, and nothing was paid after that time, as the contract was then cancelled. The witness further stated that they did not publish the contract with the defendant any more than they did any of the other business, and that they did not publish any of their business, and that he did not know of an instance when knowledge of the existence of the contract was given to any of their competitors. And witness was then asked: "Do you know of any inquiries having been made by competitors in the office of your company as to its existence?" And also to state whether or not any inquiries were made of or complaints made to any of the officers of his company. Which was objected to by defendant's counsel because what the officers of that company did or did not do could not render defendant liable, and that the evidence was incompetent; which objection was by the court overruled, and the defendant then and there excepted.

75 The witness answered: "I don't know of any. No direct inquiries were made. Goodridge said he knew he was working against an embargo of 50 cents and we had the advantage of 50 cents a ton against him, and asked me if it was so, and I told him it was not."

Witness was then asked: "Did you know of the existence of this contract prior to the meeting of the Pacific commission?"

Which was objected to by the defendant's counsel as immaterial and incompetent; which objection was overruled, and defendant by its counsel, then and there excepted.

The witness answered: "No, sir; I did not. I was not asked by any one nor thought about it." And further that the other officers of the company were George C. Lyman, manager; then E. F. Burton succeeded him, and that Lyman had something to do with the agreement with the defendant, and he expected J. B. Chaffee also had something to do with it, and that neither the defendant or any of its officers were stockholders in the Marshall Company.

On cross-examination the witness gave evidence tending to show that it was his duty to keep an account of coal mined and whether it was shipped or used and to whom it was shipped; that the regular schedule rates of defendant to Denver from the mine was $1.00 per ton.

The question was then asked witness: "You say when the accounts were made up you were paid back forty cents per ton; why was this done?" And, the witness having stated that the considera-

tion for doing it was in writing, plaintiff's counsel objected to the evidence as immaterial and incompetent; the objection was overruled and plaintiff's counsel then and there excepted. And the witness said: "Well, that was done in consideration of our
76 giving an indemnity bond. Our company gave an indemnity bond protecting the Union Pacific from all claims on account of a damage suit against them, amounting to about $65,000.00, for which they had attachments on some of the rolling stock and ties and half a mile of track of the Denver, Western & Pacific."

Q. "Was there anything else that entered into that consideration?"

A. "We were to give them coal at costs for the company's use, and not to exceed at any time $1.25 a ton, and also to give them coal for commercial use at not exceeding $1.40 a ton—that is, for Kansas but not for Denver."

The witness further stated that for coal going to Kansas they were to pay $1.40 per ton only and for the use of defendant company $1.25 per ton only, and if the cost was less than that they were to get it at cost; that under that contract the Marshall Company furnished to the defendant for its use on its locomotives from November 1st, 1885, to March, inclusive, 1887, 52,078 tons, and witness thought about an equal amount for commercial use in Kansas.

The witness then gave evidence tending to show that the defendant paid to the Marshall Company for this coal different prices; for the first few months $1.75 per ton, and latterly $1.25, and part of the time $1.60 per ton. The witness was then asked to tell how it came to be $1.75 and $1.60 instead of $1.25, which was objected to by plaintiff's counsel, and the objection sustained; to which ruling defendant, by its counsel, then and there excepted. The witness was then asked: "How much did it cost to get out coal and put it on the cars for the use of the Union Pacific in its engines, and also for its use in commercial use in Kansas?" To which plain-
77 tiff, by *its* counsel, objected, and the court sustained the objection; to which ruling defendant, by its counsel, then and there excepted.

Defendant's counsel then offered to show by the witness that the cost of getting out this coal which they were obliged to furnish the Union Pacific under the contract was largely in excess of what they got, and that by reason of that they paid for the defendant, through the contract and by furnishing the coal, a larger amount of money than they got back in rebates, so that they actually paid to the defendant at least $1.00 per ton for every ton carried by defendant; but the court refused to allow such evidence to be given or received, and thereupon the counsel for defendant then and there excepted to such refusal.

Witness further testified that he did not obtain from Mr. Goodridge any information about the contract on account of anything said between witness and any officer of defendant about keeping it

silent, and that he knew of no demand made by the defendant's officers that it should be kept silent; that he had the rates from Marshall to Denver prior to 1885, and that the only rates on coal from Marshall to Denver from 1882 to 1885 of which he had knowledge was $1.25, and that that was the only rate had by parties prior to 1885.

The witness also stated that the claim for which the Marshall Company gave an indemnity bond arose out of the building of the line of railroad of the Denver, Western & Pacific through the Marshall property, cutting through into the Marshall Company's mine and causing it to take fire, with loss of tools, &c., so that that part of the mine has never been mined since, and the claim was made against the Denver, Western & Pacific, and this company succeeded
to that and gave the bond of indemnity against that claim,
78 and that the claim had been in litigation for some years, and that the suit had been released when the bond of indemnity was given.

The witness then stated that Mr. Langford and Josèph M. Marshall were the owners of the Marshall mine, and the witness was then shown a release, which he stated had been given by the said owners of the mine when the bond of indemnity was given, which release was in words and — follows:

"Know all men by these presents that we, the Marshall Coal Mining Company, Augustine G. Langford, and Joseph M. Marshall, of Denver, Colorado, for and in consideration of the sum of one dollar to us each in hand paid by the Union Pacific Railway Company and the Denver, Marshall & Boulder Railway Company, receipt whereof is acknowledged, do hereby release and forever discharge the said Union Pacific Railway Company and the Denver, Marshall & Boulder Railway Company and the successors and assigns of them and each of them of and from all actions, causes of action, suits, controversies, claims, and demands whatsoever for or by reason of any cause, matter, or thing arising out of the construction of any railroad across the property of either of us in Boulder and Jefferson counties, Colorado.

Witness our hands and seals this twenty-ninth day of October, A. D. 1885.

(Signed) THE MARSHALL COAL MINING CO., [SEAL.]
By A. G. LANGFORD, *Manager*. [SEAL.]

[Corporate Seal of Marshall Coal Mining Company.]

AUGUSTINE G. LANGFORD.
JOSEPH M. MARSHALL."

Defendant's counsel offered the release in evidence, but the court then and there excluded the same and refused to allow it to be read, and thereupon the defendant's counsel then and there excepted to
such refusal and rejection of such evidence.

79 On redirect examination by plaintiff's counsel the witness gave evidence tending to show that at the time of the agree-

ment with defendant and the Marshall Consolidated Coal Mining Company the Marshall Company had an attachment on the engines and rolling stock of the Denver, Western & Pacific, which attachment was inherited by the Marshall Consolidated Company from the former company, known as the Marshall Coal Mining Company, and that all the litigation was against the Denver, Western & Pacific Railway Company and not against the defendant.

And on recross-examination the witness stated that he knew the claim spoken of existed and that they had to give the indemnity bond as a part consideration of the contract and before they could get the contract.

The plaintiff then called D. S. Woods, who, having been sworn, gave testimony tending to show that he was the manager of the Jackson coal mine and engaged in selling coal in Denver; that the mines of his company are situate at Canfield, 24 miles from Denver by the Utah & Pacific road and about 36 miles from Denver by the defendant's road, and was engaged in shipping coal over defendant's road from November, 1885, to August 1st, 1887, and was paying a rate of $1.00 per ton and made inquiries during that time of Thomas L. Kimball, an officer of defendant, with reference to the rates which the Marshall Consolidated Coal Mining Company was getting on coal. The inquiry was made about the month the Pacific commission was here, a short time before; also made inquiry of D. O. Clarke, superintendent of the coal department of the Union Pacific. Clarke and Kimball were together; that he told them we all ought to be put on the same basis as the Marshall Company, and that he thought from the way they were selling coal they were getting a lower rate; that the reply was
80 that they were not getting any less rate than others were and all were on the same basis, and that witness had also before that time spoken to the defendant's general agent, Keeler, about it, and that his reply was that he knew nothing about it, and that the first personal knowledge that witness had of the fact of the rebate to the Marshall Company was when the Pacific commission was here, and that a short time after the commission was here witness had a talk with T. J. Potter, the general manager of the defendant, and that Potter said he knew of the contract after he had been in office five or six weeks and said he came to Colorado to cancel it. He said it was an unjust thing.

To this answer and to that part of it that states what Potter said about its being an unjust thing defendant, by its counsel, objected and asked to have it stricken out, which was refused by the court; to which refusal the defendant then and there excepted.

On cross-examination the witness gave evidence tending to show that the Fox mine, where plaintiff got his coal, is by the defendant's road nearer to Denver than the Marshall mine; that the Jackson mine is situate on the railroad of the Utah & Pacific and the defendant, and that the former road had been running for four years, and that he had shipped over defendant's road since 1879 and had never shipped over the road of the Utah & Pacific,

and during that time there had been three different rates on coal to Denver; first, $1.25; then on the opening of the Utah & Pacific line the roads got into a fight and it dropped to 25 cents. This rate did not last long, and it was then fixed at $1.00. The rate of 25 cents lasted but a few months, and since the restoration to $1.00 the rate has continued the same on both roads, $1.00 per ton, and that
81 the rates from the Jackson, Canfield, and Marshall mines was the same, though there is eight or ten miles difference in the distance to Denver; and, further, that, so far as witness knew, no other person or company got any rebate from the schedule rate of $1.00 per ton except the Marshall Consolidated Company; that there were in all in that vicinity and within ten or eleven miles eight mines beside the Marshall and all shipping coal to Denver, all of whom, so far as witness knew, were paying $1.00 per ton.

Plaintiff also introduced HENRY GOODRIDGE as a witness, who, being sworn, gave testimony tending to show that he was engaged in selling coal from the Stewart mine from November, 1885, to August, 1887, and that the Stewart mine is located at Erie, about ten miles from the Marshall mine, and that in 1886 he made inquiries of Mr. Keeler, defendant's general agent, as to the rates the Marshall Company was getting, and Keeler answered him that there was no different rate given, and said that they were all treated alike, and also had a conversation with Kimball and Clarke about a month before the Pacific commission met, and they said we were all getting the same rate.

Witness was here asked if he also had a conversation with Rubidge, the treasurer and secretary of the Marshall Consolidated Company, as to the rates, and having answered that he did, and that it was about July, he was asked to state what Rubidge said; to which the defendant, by its counsel, objected that the evidence was incompetent and the defendant was not bound by what Rubidge said; but the court overruled the objection, and defendant then and there excepted.

And the witness said he told Rubidge he was satisfied they were getting lower rates than we were, for they could not sell coal at the price they did unless they got it. He said we were all paying the same. The witness also stated that he had a conversation with
82 T. J. Potter, the general manager of defendant, and Mr. Woods and myself told Mr. Potter that we would make out a claim for the difference between what the Marshall Company had paid and what we had paid, for we considered that we were entitled to the 40 cents, and he said, "Well, wait two or three days and I will let you know what I will do;" that Potter said he was surprised at what Kimball had told them, and that he had been there but a short time and was not responsible for what had been done before.

On cross-examination the witness gave evidence tending to show that he had been in the coal business in Denver about 12 years, getting coal from Erie and mines in that vicinity, and paid from $1.25 to $1.00 per ton; that the Utah & Pacific railroad had been

in operation and adjacent to the mines from which witness got coal since 1884 at least; never shipped over the Utah & Pacific; rates the same on both roads.

Thereupon the plaintiff offered, for the purpose of showing that the witness Rubidge was mistaken as to the pendency of suit against the Denver, Western & Pacific Railway Company at the time of the making of the contract by the Marshall Company with the defendant, — that the Denver, Western & Pacific Railway Company had been in the hands of a receiver since October 3rd, 1882. Defendant objected; objection sustained.

The case was thereupon submitted to the jury.

The jury having returned a verdict for the plaintiff in the sum of $9,437.20, defendant filed its motion for a new trial in words and figures as follows, to wit:

"Now comes the defendant in the above-entitled action and moves the court to set aside the verdict heretofore entered herein and grant a new trial—

83 (1st.) Because the court erred in admitting incompetent, irrelevant, immaterial, and improper evidence offered by the plaintiff against the objection of the defendant.

(2nd.) Because the court erred in rejecting competent, relevant, material, and proper testimony offered by the defendant.

(3rd.) Because the court erred in refusing to instruct the jury to find their verdict for the defendant herein, as requested by the defendant.

(4th.) Because the court erred in instructing the jury on its own motion.

(5th.) Because the court erred in refusing to instruct the jury as requested by the defendant.

(6th.) Because the court erred in instructing the jury as requested by the plaintiff.

(7th.) Because the verdict is contrary to law and the evidence.

(8th.) Because the verdict is against the weight of the evidence.

(9th.) Because there is no sufficient evidence to sustain the verdict.

(10th.) The verdict is excessive.

(Signed) TELLER & ORAHOOD,
Attorneys for Defendant."

And on the — day of ——, 1889, the court overruled said motion; to which ruling of the court the defendant, by its counsel, then and there excepted.

And because the foregoing matters do not appear of record it is ordered that this bill of exceptions be signed and sealed and made a part of the record in this case, which is done accordingly.

84 MOSES HALLETT,
District Judge.

We are satisfied with this bill of exceptions.

PATTERSON & THOMAS.

(Indorsed:) 2236. E. R. Taggart *v.* U. P. R. W. Co. Bill of exceptions. Filed Oct. 2, 1889. William A. Willard, clerk.

And the said bond is in words and figures as follows, to wit:

Bond on Writ of Error.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that we, The Union Pacific Railway Company, as principal, and Willard Teller and Samuel N. Wood, as sureties, are held and firmly bound unto E. R. Taggart in the full and just sum of thirteen thousand (13,000) dollars, to be paid to the said E. R. Tagggart; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at the May term, A. D. 1889, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between E. R. Taggart, plaintiff, and The Union
85 Pacific Railway Company, defendant, judgment was rendered against the said The Union Pacific Railway Company, and the said The Union Pacific Railway Company having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said E. R. Taggart, citing and admonishing him to be and appear at a Supreme Court of the United States to be held at Washington, D. C., on the 14th day of October next:

Now, the condition of the above obligation is such that if the said The Union Pacific Railway Company shall prosecute said writ to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

THE UNION PACIFIC RAILWAY COMPANY, [SEAL.]
By WILLARD TELLER, *Its Attorney-in-Fact.*
WILLARD TELLER. [SEAL.]
SAMUEL N. WOOD. [SEAL.]

Approved:
MOSES HALLETT, *Judge.*

We consent to filing of this bond this 10, 1, 1889.
PATTERSON & THOMAS.

Justification.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

Willard Teller and —— ——, sureties on the within bond, being each first duly sworn, depose and say that they are each worth in

real estate the sum below set opposite their names respect-
86 ively—that is to say, as to Willard Teller, thirteen thousand dollars; as to Samuel N. Wood, thirteen thousand dollars—over and above all their just debts and liabilities and in property subject to levy and sale upon execution.

WILLARD TELLER.
SAMUEL N. WOOD.

Subscribed and sworn to before me, at Denver, this 28th day of September, A. D. 1889.

CHARLES M. KENDALL,
Notary Public.

My commission expires Aug. 16, 1892.

(Indorsed:) Gen. No., 2236. Circuit court of the United States, district of Colorado. The Union Pacific Railway Company, plaintiff in error, *vs.* E. R. Taggart. Bond on writ of error, $13,000. Filed in the circuit court U. S. this 2d day of October, A. D. 1889. William A. Willard, clerk, by F. W. Tupper, deputy clerk.

And the said writ of error is next hereto attached, to wit:

Writ of Error.

87 Writ of error to circuit court U. S., district of Colorado.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, between E. R. Taggart and the Union Pacific Railway Company, a manifest error hath happened, to the great damage of the said The Union Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal United States Circuit Court, District of Colorado.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the 114th year.

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Allowed by—
MOSES HALLETT, *Judge*.

88 [Endorsed:] Gen. No., 2236. —— court of the United States. The Union Pacific Railway Company, plaintiff in error, *vs.* E. R. Taggart. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 2nd day of October, A. D. 1889. William A. Willard, clerk, by F. W. Tupper, deputy clerk. Teller & Orahood, attorney-for plaintiff in error.

Return.

THE UNITED STATES OF AMERICA, *District of Colorado*, } ss:

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Seal United States Circuit Court, District of Colorado.

Witness my hand and the seal of said circuit court, at Denver, in said district, this fourth day of October, 1889.

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

The defendant having served this writ of error by lodging a copy thereof for the adverse party in the clerk's office within sixty days, Sundays exclusive, after the rendition of the judgment herein and having given the security required by law on the issuing of the citation, this writ is therefore a supersedeas. (By consent of plaintiff.)

Teste:

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

89 And the said citation is next hereto attached, to wit:

Citation.

90 Citation, U. S. circuit court.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

The United States of America to E. R. Taggart, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein The Union Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 2nd day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

MOSES HALLETT, *Judge.*

91 [Endorsed:] Gen. No., 2236. Circuit court of the United States, district of Colorado. The Union Pacific Railway, plaintiff in error, *vs.* E. R. Taggart, defendant in error. Citation. Filed in circuit court of the U. S. this 4th day of October, A. D. 1889. William A. Willard, clerk, by F. W. Tupper, deputy clerk. Teller & Orahood, attorney- for plaintiff in error.

Proof of Service.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

On this 4th day of Oct'r, A. D. 1889, we accepted service of the within citation on the within-named E. R. Taggart, defendant in error.

T. M. PATTERSON,
C. S. THOMAS,
Attorenys for Def't in Error, E. R. Taggart.

92 UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

I, William A. Willard, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore filed or had and entered in said court and in a certain cause lately in

said court pending, wherein E. R. Taggart was plaintiff and The Union Pacific Railway Company was defendant, as fully and completely as the same still remain on file or of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this fourth day of October, A. D. 1889.

{ Seal United States Circuit Court, District of Colorado. }

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Endorsed on cover: Case No. 13,812. Colorado C. C. U. S. No. 212. The Union Pacific Railway Company, plaintiff in error, *vs.* E. R. Taggart. Filed October 18, 1889.

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IN

The Supreme Court

OF THE

United States.

212.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
E. R. TAGGART,
Defendant in Error.

This brief also applies to No. 211
Union Pac. Ry. Co.
vs.
Henry Doolittle et al.

BRIEF OF PLAINTIFF IN ERROR.

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BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This was an action brought by the defendant in error in the Circuit Court for the District of Colorado, July 11, 1888, which sets up, in substance, that plaintiff in that case was, during the years 1885, 1886 and 1887, engaged in the business of buying and transporting coal from the Fox Coal Mine in Boulder, Colo. to Denver, a distance of

twenty-four miles; that the defendant was a common carrier from said mine and beyond to Denver, and was controlling a line of railroad between said places, and that as such carrier it was bound to carry coal and other freight for a reasonable, uniform and proper charge for its services without distinction or discrimination between individuals or companies and with equal rates and opportunities to all employed in the same class and character of business. It then avers a violation of its duty in that from the first day of November, 1885, up to the 2d day of September, 1887, the said plaintiff shipped from said Fox Mine to Denver 23,593 127-500 tons of coal, which was carried by the said defendant, and that said plaintiff then paid to said defendant for such carriage at the rate of $1 per ton, the said plaintiff then believing he was being charged no greater or less rate than said railway company charged and collected of all his competitors for the same service, and that he never had any knowledge of a different state of facts until August, 1887, when he became aware of the real facts, by the evidence taken by the Pacific Railway Commission, duly appointed by act of Congress; that during all the time a certain corporation known as the Marshall Consolidated Coal Mining Company, was also engaged in mining and shipping coal from its mine near the mine of plaintiff, and that from the 1st of November, 1885, up to September 1, 1887, said last named company had shipped from its mine and station more than 200,000 tons of coal, the greater part being shipped to Denver; that during all that time increased facilities for transportation of coal

was furnished by defendant to said Marshall Company, and the amount of coal sold by said Marshall Company in Denver was greatly in excess of that which was sold or could have been sold at a profit by any of its competitors, and plaintiff had always, until September 1, 1887, supposed said Marshall Company also paid $1 per ton; that the distance from the Marshall Company Mine to Denver was no greater than from the Fox Mine of plaintiff, and from other mines in northern Colorado, but that during all the time above mentioned the Marshall Consolidated Mining Company was paying but 60 cents per ton for carriage of coal to Denver, while the plaintiff was compelled to pay $1 per ton, whereby it is alleged he had suffered damage of 40 cents on each and every ton of coal so shipped as aforesaid, to wit, 40 cents on the 23,593 133-500 tons, amounting to the sum of $9,437. There were three other counts in the complaint, all stating substantially the same facts, to wit, the character and business of plaintiff and defendant, the establishment of the schedule rate on coal from Erie, Louisville and Marshall; the fact that the plaintiff shipped his coal from Marshall; the schedule from all three places to Denver being the same; the ignorance of plaintiff that any other rate was allowed any one; the averment on belief that the Marshall Company sold coal in excess of what it could have sold if no rebate had been given it, and that a rebate of 40 cents per ton was secretly and clandestinely given to it, and in each count the statement as to discrimination, etc., is as follows: In the first count (fol. 6), after stating the fact that the defendant received 60 cents only from The

Marshall Company for carriage of a ton, of it, says: "Thereby compelling the plaintiff to pay it the sum of 40 cents more than it charged the said Marshall Company, by means whereof it unjustly, unfairly and wrongfully discriminated against this plaintiff in favor of said company, to the great damage and injury of this plaintiff. That by reason of said unjust and unlawful discrimination plaintiff was put to great loss and damage in this, to wit, that he was wholly and unjustly deprived of a profit of 40 cents per ton on each and every ton of coal shipped by him, and which he could have realized but for said practice of said defendant."

In the second count (fol. 12), after stating that the amount of difference paid between plaintiff and the Marshall Company as being 40 cents per ton, it concludes thus: "By means whereof, it unjustly, unfairly and unlawfully discriminated against the plaintiff and in favor of the said company, to the great damage of the plaintiff, and that by reason thereof defendant understood and agreed to repay to plaintiff said sum of 40 cents per ton, which it repaid to the Marshall Company for the same service."

In the third count, the cause of action, the breach and its effect, is set forth exactly as in the first count (fol. 18).

In the fourth count, after setting up the identity of service, etc., with that rendered to Marshall Company "did charge, demand and receive from him a greater sum while operating under the same classification and schedule than while it openly under the same schedule charged, demanded and received from said Marshall Company for like serv-

ices from the same place and upon like conditions and under similar circumstances, and refused to allow the same concession to plaintiff which it had granted to the Marshall Company, and concludes then (fol. 23) that the actual damage sustained and overcharges paid by plaintiff by reason of the premises to the defendant is $9,437.31, wherefore he prayed judgment for, first, $9,437.31 under the first three paragraphs or counts of the complaint; second, for the sum of $28,311.90 statutory damages for the cause of action stated in the fourth count of complaint, and, third, for costs and attorney fees.

To this complaint as first drawn, defendant demurred. The demurrer was sustained and plaintiff amended so as to show want of knowledge on part of plaintiff of the facts up till September 1, 1887. And, thereupon, the defendant filed its answer, containing, first, a denial of each and every material allegation in the complaint contained, also setting up in substance, fol. 31, *et seq*, that it did on 1st of January, 1885, fix and establish and charge a rate of $1 per ton for transporting coal from Erie, Marshall and Louisville to Denver, and establish such rate as a standard, uniform and general one for all persons shipping coal from such stations to Denver, and that the rate so fixed did from thenceforth constitute its standard and uniform rate, when paid in cash and independent of any other consideration which might pass between defendant and parties for whom it transported coal, and that same schedule rates were published, and were intended to apply without discrimination to all persons shipping coal over

defendants road between places mentioned. It also admitted that at all of the times mentioned in said complaint from November 1, 1885, to September, 1887, there was a corporation doing business at Marshall and transporting coal from Marshall to Denver, known as The Marshall Consolidated Coal Mining Company, and that its coal mines was about the same distance from Denver as were those of the plaintiff; but denied that the output of the mines of said company were at any time increased, or the amount of coal sold by it increased over that of its competitors by any act, or thing done, or omitted to be done, by the defendant, in respect to carriage of coal of the said company; and it also denied that it did, at any time, conceal any of its practices or doings from the plaintiff, or from any person whatever; and also denied that it ever did, clandestinely or otherwise, charge or secure from the said Marshall Company, the sum of 60 cents only, for its services in carriage of coal for said Marshall Company from Marshall to Denver, and denied that it ever compelled plaintiff to pay $1 per ton or ever, at any time or place, unjustly or unfairly or unlawfully discriminated against the plaintiff in favor of the Marshall Company or other persons; denied that he had been damaged in any sum whatever or was deprived of any profit whatever by reason of the premises, and also denied that it ever agreed to transport coal for plaintiff as cheap as for any other firm, but avers that it did, as a matter of fact, transport coal for said plaintiff as cheaply as it did for any other person or corporation. It further denied that it ever received in the first in-

stance $1 per ton for transportation of coal for said Marshall Company, and afterwards, or at any time, repaid to said Marshall Company a reduction of 40 cents per ton on coal carried, or any sum whatever, and also denies that, by any means whatever, it charged to or received from said Marshall Company the sum of 60 cents per ton only for carriage of its coal, and denied all and every discrimination alleged against it. And for a further and second answer to the complaint, the said defendant set up in substance:

Third—That, in May, 1880, The Denver, Western and Pacific Railway Company constructed a railroad a portion of the way from Denver to Boulder, and in doing so passed over certain coal land belonging to one Langford and others, and known as the Marshall Mine, but had never paid for its right of way, and in the construction it broke into the said mine and caused great damage by fire in said mine; to recover which the said owners began suit for $65,000, and levied an attachment on the property of said railway company. That afterwards the said Denver, Western and Pacific Railway Company's property was all sold out and passed into the hands of The Denver, Marshall and Boulder Railway Company, which was owned and controlled by The Union Pacific Railway Company, said property coming to the Denver, Marshall and Boulder Company subject to said attachment. That, prior to October, 1885, The Union Pacific Railway Company was the owner of the capital stock of The Union Coal Company, which said coal company was the owner and lessee of certain coal mines at Erie, Weld County, and at Louisville, in

Boulder County, and had been engaged in working the mines and furnishing The Union Pacific Railway Company with coal for its engines, and also engaged in mining coal for sale. That a company known as The Marshall Consolidated Coal Mining Company about that time acquired title to the said Marshall Mine, and, by assignment by the said Langford and others acquired title to their claim for $65,000, secured by attachment on the line of railroad, etc., then held by The Denver, Marshall and Boulder Railway Company. That thereupon, on the 13th day of October, 1885, The Union Pacific Railway Company, through its President, caused to be drawn and signed by the President a contract between it and The Marshall Consolidated Coal Mining Company, in which it was recited that, it being for the interest of the Union Pacific Company to discontinue the actual working of the said The United Coal Company's mines, and to contract with the said Marshall Coal Company to furnish the railway company with all the coal needed for its own consumption on its road and its branches, not to exceed 50,000 tons per year for the first year, and 100,000 tons for every year thereafter; that therefore, in consideration of $1, and in consideration of The Union Coal Company going out of the coal business, and the purchase from the Marshall company by the Union Pacific Company of the coal used for its own consumption, at the rate mentioned therein, and in consideration of the rates for transportation of coal therein agreed on, the said coal company agreed to furnish, from said Marshall Mine, all coal ordered by the railway

company for its own use and consumption and the use of its branches, such amount not to exceed 50,000 tons the first year, and not to exceed 100,000 tons for other years, and to deliver the coal on board the cars of the Union Pacific, at a price not to exceed $1.25 per ton, and at the actual cost of putting it on the cars, and if such cost was less than $1.25 per ton, then at actual cost. And that, so long as the railway company would transport the coal mined by the coal company at rates as low as any other railroad company, it would ship all of the coal mined over said railway company's line to Denver, and also that, on coal thus shipped to Denver, the coal company should pay the regular rate of $1 per ton, unless 200,000 tons were mined and furnished for transportation yearly, in which case a rate of 60 cents per ton should be paid for all coal transported over the railway company's line to Denver, and if the rate is reduced below $1, then the 60-cent rate should be reduced in the same proportion. It was also provided that, if the railway company should order coal in excess of the amounts of 50,000 and 100,000 tons, fixed for yearly amounts, then the railway company should pay the cost of mining and putting such coal on the cars, plus 50 cents per ton, *except* that in no case should the price for mining and loading such coal exceed $1.40 per ton. And it was further agreed that, as a part consideration of the contract that a majority of the capital stock of said coal company should be held for two years, and if the company desired to sell, it should first offer it to the railway company. The contract was sent to the General Attorney of The Union Pacific Rail-

way Company. The contract was sent to the General Attorney of The Union Pacific Railway Company for approval before delivery, and thereupon said attorney prepared a bond of indemnity for the execution by the coal company, indemnifying the railway company against the $65,000 clause on attachment, and on execution of the said bond, and as a part of the transaction, the contract was delivered to the coal company.

To this second defense a demurrer was interposed by plaintiffs, and the Court sustained the demurrer, to which the defendant, by its counsel, duly excepted, the Court giving its reasons for such judgment (fols. 51–57), which reasons will be hereafter set forth and commented upon.

On the trial before a jury, Henry Goodridge was sworn and testified that he and his partner were engaged in shipping coal from Erie to Denver, over defendant's road, between October 3, 1885, and August 12, 1887, and shipped 12,961 tons and paid therefor $1 per ton, and from mines about the same distance or a little less from Denver than the Marshall Mine. On cross-examination, he stated there was another line of railroad, the Denver, Utah and Pacific, running to Denver, and lying within 200 yards of their mine; that it was being operated prior to 1885, and he understood the rates on that road to be $1 per ton to Denver, and as far as he knew to continue at that rate.

The plaintiff, E. R. Taggart, gave evidence tending to show that he had been shipping coal from the Fox Mine, near the Marshall Mine, and on the same vein with it, there being no other road

from Marshall to Denver except that of defendant company. That from November, 1885, up to latter end of July, 1887, he had shipped over defendant's road to Denver 23,593 tons of coal and paid $1 per ton; that the defendant company rendered bills to The Marshall Consolidated Mining Company at $1 per ton, and paid back 40 cents per ton to the Marshall company.

The plaintiff then offered in evidence two letters—one from T. L. Kimball, Esq., dated August 18, 1887, Kimball being the General Traffic Manager of the defendant company at that time—one letter having been received by witness and addressed to him, and the other being witness' reply thereto.

To the introduction of which the defendant, by its counsel, objected.

The letters were received, and defendants' counsel excepted.

The letter of Kimball set up and gave as the reason for the alleged discrimination, that the circumstances between the coal shipped from Fox Mine and the Marshall, were entirely dissimilar, and also referred to the contract set forth in second defense, in which the Marshall Company agreed to furnish coal for defendant's use, on its locomotives, at not to exceed $1.25 per ton, and commercial coal for not to exceed $1.40, when, in fact, the prices, except for the contract, would have been $1.30 and $1.60 per ton. The letter of the witness, Taggart, was a denial of the dissimilar conditions and an argument against the position of Kimball (fols. 65–68). In this connection, also, the plaintiff's counsel (fol. 70) asked the witness if he had

any knowledge of the existence of the special rate to the Marshall Company prior to the disclosures before the Commission, to which defendant objected —that it was immaterial and incompetent—but the Court overruled the objection, and the defendant excepted, and witness answered he knew nothing until it was disclosed before the Commission. On cross-examination he showed that he began dealing with the defendant in 1882, and shipped to Denver several thousand tons of coal over its road, at $1.25 per ton, for a portion of the time, and for the rest of the time, $1, and that the rates were the same as everybody else paid; that there was nothing exceptional in either rate, except as to the Marshall Company, and he knew of no other firm or Company who had a rate less than $1, except the Marshall Company; that he knew the defendant claimed as a bar to plaintiff's claim, a contract with the Marshall Company, in consideration of the latter Company supplying the defendant Company with coal, at a price much below the price at which they could get it out of the mine, and making a difference of from 20 to 25 cents per ton of coal, less than the cost of getting it out. Defendant's counsel then asked, "As a matter of fact, do you know what it did cost to get out a ton of coal and put it on the cars at the Marshall or Fox Mine?" To which plaintiff, by his counsel, objected, and defendant's counsel claimed that the good faith of the defendant company, in making a contract with the Marshall company, was in question, and the question proper on that ground, but, the Court sustaining the objection, the question was not answered, and the de-

fendant excepted. The witness also gave evidence tending to show that the rates of $1.25 and $1 per ton, from 1882 to 1887, was not to be complained of, and that the suit was brought because of the discrimination of 40 cents made between plaintiffs and the Marshall company.

Plaintiff also introduced, as a witness, Robert H. Rubridge, Secretary and Treasurer of The Marshall Consolidated Coal Mining Company, who stated that the Marshall company shipped from Marshall 79,970 tons, and from Louisville 73,067 tons, between November 1, 1885, and May 1, 1887, and from May 1st to August 1, 1887, about 3,000 tons per month, and that from Marshall mine there was to Denver 67,863 tons from November 1, 1885, to August 1, 1887; that the freight to Denver was $1 per ton, but that 40 cents per ton was paid back; that the amount paid back up to August, 1887, was $27,145.33, and the contract was then canceled. Witness also stated that he knew of no inquiries about the contract between the Marshall company and the defendant company, except that Goodridge said he knew he was working against an embargo of 50 cents a ton, and asked witness if it was not so, and he told him it was not. Witness was then asked, "Did you know of the existence of this contract prior to the meeting of the Pacific Commission?" To which defendant, by its counsel, objected that it was incompetent and immaterial; but the Court overruled the objection, to which defendant excepted. To which the witness answered, "No, sir; I did not; I was not asked about it by any one, or thought about it." The witness

further testified that the repayment of 40 cents per ton was made in consideration of the coal company having given a bond of indemnity to the Union Pacific Company against all claims for damages against it, amounting to about $65,000, for which there was an attachment on some of the rolling-stock, ties and half a mile of track of the Denver, Western & Pacific; and, for a further consideration, "We were to give them coal at cost for the company's use, and not to exceed at any time $1.25 per ton, and also coal for commercial use, at not exceeding $1.40 per ton," and that under that contract the Marshall company furnished to the Union Pacific company, between November 1, 1885, and March, 1887, 52,078 tons, and about an equal amount for commercial use in Kansas. The witness also gave evidence tending to show that defendant company did pay for this coal, for the first few months, $1.75, but later, only $1.25 per ton, and part of the time $1.60, and the witness was asked to explain how it came that $1.75 and $1.60 were paid instead of $1.25 per ton, which was objected to by plaintiffs, and the objection sustained, and the defendant excepted. The witness was then asked: "How much did it cost to get out coal and put it on the cars for the use of the Union Pacific, in its engines, and also for its commercial use in Kansas?" (fol. 81.) To which plaintiff objected, and the objection being sustained by the Court, the defendant excepted. The defendant company then offered to show by the witness that the cost of getting out this coal, which they were obliged to furnish the Union Pacific under the contract, was largely in excess of what they got, and that, in that way,

they paid to the defendant and through the contract, by furnishing the coal, a larger amount of money than they got back in rebates, so that they actually paid to defendant company at least $1 per ton for every ton carried by defendant. But the Court refused to hear the testimony, and the defendant excepted.

Witness further testified that he knew of no demand on part of defendant that the contract should be kept silent, and that from 1882 to 1885 coal rates from Marshall to Denver were $1.25 per ton, and from 1885 to 1887, $1 per ton, and he knew of only one rate. The witness further stated that the claim of the Denver, Western and Pacific road was for damages caused to the Marshall Company's coal mine by the Denver, Western and Pacific cutting into the mine, and causing it to take fire, with loss of tools, etc., and that that part of the mine had never been worked since. That this company succeeded to that company (the original Marshall Company), and gave the bond of indemnity against that claim, which had been in litigation some years, and that suit was released when bond was given. The indemnity bond was then introduced (fol. 82), and defendant counsel also offered in evidence the release of suit in attachment, which was excluded, and defendant excepted. On redirect, the plaintiff showed by the witness that at the time of making of the agreement between the defendant company and the Marshall Consolidated Company, the Marshall Coal Mining Company had an attachment on the engines and rolling stock of the Denver, Western and Pacific Railway Company, which attachment was held by

the Marshall Consolidated Company, from the former company, the Marshall Coal Mining Company, and that all the litigation was against the Denver, Western and Pacific Railway, and not against The Union Pacific Railway Company, and on re-cross-examination witness said he knew the claim spoken of existed, and that his company had to give the indemnity bond before they could get the contract.

The plaintiff also showed by witness D. S. Wood (fol. 84), that he was mining coal at Canfield, and shipping to Denver; that Canfield was on the Denver, Utah and Pacific Railroad, and also on the defendant's line; that by the Denver, Utah and Pacific Railroad line it was twenty-four miles to Denver, and by the defendant's line thirty-six miles, but that he shipped over defendant's line. That Kimball, the General Traffic Agent of defendant, had told him prior to August, 1887, that the Marshall Consolidated Company was not getting any less rate than others, and witness was also told the same thing by defendant's General Agent at Denver, Keeler. That the first that witness knew of the contract was at the time the Pacific Railway Commissioners were sitting at Denver, and that a short time after the Commission was here he had a talk with T. J. Potter, then General Manager of The Union Pacific Railway Company, and that Potter then said he knew of the contract after he had been in office five or six weeks, and said he came to Colorado to cancel it, and said it was an unjust thing. To that part of this answer that states what Potter said about its being an unjust thing defendant, by its counsel, objected and asked that it be stricken out. But the

Court refused to strike it out, and defendant excepted to the ruling. On cross-examination, witness showed that he had never shipped over the Denver, Utah & Pacific road, but had shipped since 1879 over defendant's road; that since 1879 there had been but three rates, one at $1.25 per ton; that then, upon the opening of the Denver, Utah & Pacific, it dropped, for a short time only, to 25 cents, and was then fixed at $1, and was the same on both roads; that the rate from the Jackson, Canfield and Marshall mines was the same though there is eight or ten miles difference in the distance to Denver, and that no other company or person, to witness' knowledge, got any rebate except the Marshall Consolidated company, and that there were in the vicinity eight mines, besides the Marshall Mine. Plaintiff also introduced other testimony by witness (fol. 85) tending to show that in 1886 he had a talk with D. B. Keeler, defendant's general agent, as to rates, and Keeler, and afterward Clark and Kimball, all agents of the defendant, told him that all were getting the same rate. The witness was then asked by plaintiff's counsel if he also had a conversation with Rubridge, the Secretary of the Marshall Consolidated company, as to rates, and on his saying he had, and that it was about July, he was asked to state what Rubridge said. To this defendant objected that the evidence was incompetent and defendant could not be bound by what Rubridge said, but the Court overruled the objection, and defendant excepted. The witness said he told Rubridge he was satisfied they were getting lower rates, for they could not sell coal at the price they did unless they got it,

and he (Rubridge) said "we were all paying the same." On cross-examination, witness stated that he had been in the coal business twelve years, and that the Denver, Utah & Pacific had been operated adjacent to his mine since 1884, but that he never shipped over it, and that rates were the same on both roads.

BRIEF.

On this record we have assigned for error as follows:

First—The Court erred in sustaining the demurrer to the second answer of the defendant which sets up the facts on which the agreement, also set forth therein, was made (fols. 28 to 49 and 59).

Second—The Court erred in admitting in evidence the letters of E. R. Taggart and T. L. Kimball (fols. 70 to 73).

Third—The Court erred in refusing to allow witness Taggart to answer as to what it cost to get out a ton of coal and put it on the cars at Marshall Mine (fol. 76).

Fourth—The Court erred in not allowing the witness Rubridge to answer the question, "How much did it cost to get out coal and put it on the cars for the use of the Union Pacific company on its engines, and also for its commercial use in Kansas." (Fol. 81.)

Fifth—The Court erred in not allowing defendant to show by witness, Rubridge, that, by reason of cost of getting out coal, etc., the Marshall Consolidated company actually paid at least

$1 per ton for coal carried by the defendant company (fol. 81).

Sixth—The Court erred in refusing to receive in evidence the release from The Marshall Coal Mining Company to the defendant company (fols. 82 and 83).

Seventh—The Court erred in refusing to grant a new trial and in entering judgment on the verdict, because there was no sufficient evidence to support the verdict and especially to sustain it as to the amount of damages found by it.

By the statement of facts above made, which we think is a full and fair one, of what the record contains, it is clear that on the trial the Court below either did not adhere to its rulings on demurrer to second answer of defendant, or it admitted, on both sides, much irrelevant testimony; for if, as was held on demurrer, the facts set forth in second defense, made no defense, then did the Court err when it admitted plaintiff to introduce the letter of Kimball, in which the defense was made, and the letter of Taggart, in which an argument against the said defense was made (see fols. 70 to 73).

We will notice these assignments in their order. First, then, did the Court err in sustaining the demurrer to second defense? On this we say:

First—The action was brought under Sections 7, 8 and 9, on page 309, of Laws of Colorado, 1885. These sections read as follows:

"SEC. 7. (Unjust discrimination.) No railroad corporation shall, without the written approval of said Commissioner, charge, demand or receive from any person, company or corporation, for the transportation of persons or property, or for any

other service, a greater sum than it shall, while operating under the classification and schedule then in force, demand or receive from any other person, company or corporation, for a like service from the same place, or upon like conditions and under similar circumstances, and all concessions of rates, draw-backs and contracts for special rates shall be open to and allowed all persons, companies and corporations alike, at the same rate per ton per mile, upon like conditions and under similar circumstances, except in special cases designed to promote the development of the resources of this State, when the approval of said Commissioner shall be obtained in writing."

"SEC. 8. (Extortion.) No railroad corporation shall charge, demand or receive from any person, company or corporation an unreasonable price for the transportation of persons or property, or for the handling or storing of freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad corporation and not specified in the classification and schedule prepared and published by such railroad corporation. The Superintendent or other chief executive officer of each railroad in this State shall cause to be kept posted up in a conspicuous place in the passenger depot in each station where passenger tickets are kept for sale, a printed copy of the classification and schedule of rates of freight charges then in force on each railroad, for the use of the patrons of the road. Any railroad company violating any of the provisions of this section shall be deemed guilty of extortion and be subject to the penalties hereinafter prescribed."

"SEC. 9. (Penalty). Any railroad corporation that shall violate any of the provisions of this act as to leading-points, freight cars, unjust discrimination or extortion, shall forfeit, in every such case, to the person, company or corporation aggrieved thereby, three times the actual damage sustained or overcharges paid by the party aggrieved, which triple damage shall be adjudged to be paid, together with the cost of suit and a rea-

sonable attorney's fee,-to be fixed by the Court, and taxed with the costs." * * *

Under this law, plaintiff was bound to show, both by allegation and proof, that defendant had been guilty either of extortion or unjust discrimination, of which plaintiff was the victim.

The statute itself, Section eight, has defined what extortion shall be, viz.: "Demanding or receiving an unreasonable price for transportation of persons or property." There is in the complaint no allegation in terms "or in the facts stated" of any overcharge or extortion, for transportation. Nor is there any allegation in the complaint of any facts sufficient to show an unjust discrimination against, or resulting in any injury or damage to the plaintiff.

By reference to the complaint it will be seen that the first and third counts (fols. 6 and 18) set forth the injury or damages to plaintiff, to consist in the fact that the defendant charged plaintiff $1 per ton and assumed to charge the Marshall company $1, while, in fact, it received of the Marshall company only 60 cents per ton and received it secretly and clandestinely, "Thereby compelling the plaintiff to pay 40 cents per ton more than it charged the said Marshall company, *by means whereof* it unjustly, unfairly and unlawfully discriminated against the plaintiff," etc." This conclusion is clearly a *non sequitor* from the premises, as we shall notice further on, since the fact stated, in the absence of any allegation, that $1 was too much, shows no *unjust* discrimination. The second count of the complaint, after stating the same facts as to schedule price, charge to plaintiff and the rebate allowed to the Marshall company of 40 cents per ton,

concludes thus, " By means whereof it unjustly, unfairly and unlawfully discriminated against the plaintiff in favor of said Marshall company," and there is in neither of the four counts any allegation of " extortion " or even " overcharge," except in the second (fol. 12), where it is alleged plaintiff made a demand on defendant for the sum of $9,437.31, " the amount of said overcharge," which is not an allegation that the price named in the schedule was an overcharge. The fourth count simply sets forth that plaintiff was charged more for a like service under similar conditions and circumstances, than was charged the Marshall company, and no allegation of any kind to show whether plaintiff paid too much or the Marshall company too little.

Now we insist that there is, therefore, no cause of action stated in this complaint, either at common law or under the statute, and as this objection can be raised, under the Colorado Code, " at any time." Colorado Code, 1887, Sec. 55, we think this case should end now and here, since it alleges no violation of law, either statutory or common, and shows no damages suffered.

But if this should be held otherwise by this Court, and that a cause of action has been stated, it is clear that our defendant could defend, so far as it is founded on the common law, by simply denying that we have ever been guilty of the acts which are alleged to have given rise to the cause of action, or by showing such a state of affairs as show the conditions and circumstances surrounding the transaction complained of were such as took the core out of the statute, or outside the purview of the common law. Or, in other words, since the

statute itself recognizes the fact that there may be a just, as well as an unjust, discrimination, and that must depend on circumstances which may show dissimilar conditions, the defendant may plead the facts, circumstances, and conditions upon which its action was based as they existed at and before the discrimination was made.

The defense was a lengthy one, but we submit it shows circumstances that justify the discrimination made. It shows that the defendant company, having been indirectly, through The Union Coal Company, engaged in mining coal, became anxious to get out of that business; at the same time it was anxious to obtain coal for its own use on its engines, and also anxious to obtain a release of a certain attachment levied in favor of the former owners of the Marshall Mine, on property acquired by the Union Pacific and necessary to its operations —the property coming to it subject to the attachment. On these grounds it entered into the contract set forth, and by it the company quit coal mining, got released from the attachment for $65,000, got a contract out of The Marshall Consolidated Company to deliver it coal for its own use at *cost* of putting it on the cars—not to exceed $1.25 per ton; got commercial coal for use in Kansas at cost not to exceed $1.40 per ton; got a contract for five years' time, and got an option on the capital stock of the coal company for two years, and got a contract for 50,000 tons of coal to be furnished for its own use for first year, and 100,000 for each year thereafter.

On the face of it, this contract was a fair, reasonable and probably highly profitable one for the

railroad company, and was worth to the railroad company much more than the rebate paid or to be paid under it, and this was the distinct and undenied allegation of the second defense. Indeed, the demurrer not only admitting that allegation, but all the facts set forth and leading up to it, it must be admitted that, upon the record herein, the facts show that instead of the Marshall Company paying less than $1 per ton, they really paid more, and there was, therefore, no unjust discrimination and so no unreasonable charge in the regular $1 rate.

This action is brought under the Colorado statutes and under the common law, and the question is, did the facts and circumstances, including the agreement, constitutue a defense to the charge of the complaint? This is a question upon which few authorities are to be found. But in general, as to the right of a railroad corporation to make contracts to the same extent as individuals, we have the expression of this Court in the case of Chicago, etc., R. R. vs. Iowa, 94 U. S., 161, wherein Chief Justice Waite says: "This company, in the transaction of its business, has the same right and is subject to the same control as a private individual under the same circumstances," and this, we think, is in accord with both reason and authority, since the adoption of any other rule would lead to endless complications. No authorities need be cited to show that the power to do business carries with it the rights incident to a transaction of that business in the ordinary way, and to do and perform all acts and make all agreements ordinarily incident to it and to succeeding in it, and all contracts thus made

and not violating any law or any rule of public policy must be sustained and are good, either as a defense or as a ground of action.

This, we contend, is the character of the agreement set up as a defense in this case to the charge of unjust discrimination.

To this second defense, plaintiff demurred and the Court sustained the demurrer, the demurrer in the case of Marfell vs. Goodridge, No. 211 of this term, being heard at same time, and the decision in that case and the reasons then given standing as the decision and reasoning of the Court in this case. (See fol. 51 *et seq.*, case 211.)

The Court below sums up its objection and the ground of its decision thus:

> "The whole answer amounts only to this, that the Marshall Company is allowed less rates than other shippers are required to pay upon considerations that are satisfactory to defendant, and it is obvious that this is no answer to a complaint of unlawful discrimination." (Fol. 55.)

But we respectfully submit that that statement is only a partial statement as to what the answer amounts to, and that in addition to what the Court states, the answer, in express words, averred that the agreement mentioned therein was made for the reasons stated in the answer and for no other; and that under that contract the Marshall Company had paid and the defendant had received of the coal company, as a matter of fact, *more* than the $1 rate, though it was not intended it should when the contract was made, and that at the time the contract was made it was *believed* that by reason of the contract the Marshall Company would pay

for the five years the full schedule price of $1 per ton.

It is clear, also, that this answer sets up the good faith of the company in making this contract, and that it was made because of the facts stated therein, and with no intent to evade or violate the law, or to discriminate against anybody, and hence it is *not* "obvious" to us, at least, and we think it is obvious to no one, that "*this* is no answer to a complaint of unlawful discrimination." The right to settle and compromise matters in litigation or in dispute between a railroad company and others, is as important and as much under the protection of the law as between individuals, and when a settlement of such claim is made in good faith we know of no law that will allow a Court to declare such a settlement *null*, unless in some way it violates some rule of law. If it be lawful to settle a claim by compromising it, then it is surely error to deprive either party of the right to use such compromise as the consideration of other lawful contracts, the end and purpose of such contract being also lawful, and that is the error committed in this case. The Court below further says:

"This law cannot be controlled or defeated by *any* agreement between the railroad and the favored shipper. It is true that when the consideration paid for reduced rates by the favored shipper is obviously equal to the discount allowed him, the law does not apply."

To which we say, as to the first proposition, that we do not seek to control or avoid the law by this agreement. We seek simply to show that, by reason of the agreement, the case does not come

within the law. To say that *no* agreement made between a railroad company and a shipper could prevent a discrimination as to rates resulting from such agreement from being held unjust, is to say that no agreement on that subject can be made, which is certainly not true. The second proposition, that the law does not apply when the consideration paid for reduced rates is equal to the discount allowed, is correct, and it certainly follows that if the railroad company sets up, by way of defense to the charge of unjust discrimination, that the *price* paid for the reduced rates was *equal* to, and that when made it was thought it would be *equal* to, the discount for the five years, obviously the answer was a good one, since under it proof of the exact state of facts npon which it might appear that the consideration for reduced rates mentioned in the answer was equal to the discount. In other words, the Court says that a defense that sets up a consideration for reduced rates paid, that is equal to the discount allowed, is a good defense; but, in the next breath, says a defense that, by the facts alleged, and in express terms sets up, that the consideration *was* equal to the discount, is bad.

Again, the Court says:

"Whenever the fact appears, since it matters not in what form the shipper pays the usual rates, the alleged discrimination disappears and the contract is no longer obnoxious to the law."

To this, too, we cheerfully assent, and we say, "Since it *matters not in what form the shipper pays*," it is as much a payment to settle matter in litigation and as much a payment to bind oneself to furnish 50,000 tons of coal for one year and 100,000

tons for four years, at a price below cost, as to pay cash on each ton carried, always provided the settlement and contract to furnish coal at those prices was made in good faith. The conclusion thus drawn by us is, we think, incontrovertible, and, hence, on the Court's own statement, the judgment of the Court in sustaining the demurrer was an error, and it was error beyond dispute, unless the reasons given by the Court why this principle could not thus apply to the case are sound. The Court (fol. 56) further says:

"If, to illustrate, the damages due the Denver and Western Company have been liquidated and the agreement was to carry a certain quantity of coal for the amount so fixed, the question would be different."

How different, let us ask? How does it affect the question of whether the discrimination was just or unjust, that the amount was or was not liquidated, provided only, that the contract was made in good faith and both parties were willing to take the claim as it stood, as the consideration for the discount? To hold that the mere fact that the amount is unliquidated is to deprive both parties of their undoubted right to use the compromise for a legitimate and useful purpose, a right which they certainly had. Besides, in this case, the demurrer admits the facts set up in the answer, and the Court is not at liberty to indulge in any inferences against those facts; it was, therefore, bound to hold this claim of $65,000 as a valid, subsisting claim, and whether liquidated or not, cuts no figure whatever if parties saw fit to offset any amount against rates. But more than this, the

contract was to carry a certain quantity of coal, not for the claim of $65,000, which was released, and of which the railroad company got the benefit alone, but in consideration, also, that the coal company would mine and furnish to the railroad company, and on its cars, a fixed amount of coal per year for five years, at a fixed price per ton.

We know of no rule of law that makes a contract bad, simply because made on more considerations than one. The Court further says:

"As is stands, the agreement is to give the Marshall Company a reduced rate, for certain considerations, which, defendant says, are sufficient to make up the discount from the schedule rate; and, as to that matter, the fact cannot be ascertained from the contract or otherwise. *So understood*, it is clear that the contract affords no protection to defendant or to the discrimination in rates to which plaintiffs and other shippers of coal over defendant's road are subject."

Here the whole ruling is put upon an alleged impossibility of ascertaining, "from the contract or otherwise," whether the considerations mentioned in the contract are sufficient to *make* up to the defendant company the discount allowed to the coal company. This ruling, on this ground, is certainly erroneous. Neither the Court nor any shippers have or had any right to question the action of the defendant company in making such a contract, if the contract represents the best judgment of the defendant, and made *bona fide*, without intent to evade the law, upon any such ground as that stated. If, in the honest judgment of the officers of the defendant company, who made the contract, the considerations which entered into it, and upon

which alone it was made, were sufficient to warrant the company to pay *back* to the Marshall Company 40 cents per ton for each ton it shipped for five years, that is enough. Nothing more should be or legally could be required to make it a good contract, and good for all purposes. True, it would be impossible to tell, in advance, whether the defendant company had acted wisely or otherwise, since it may be that if they had litigated the $65,000 claim, it might have been cut down to $10,000, or even less, and it may also be that, within the five years, coal for defendant company's use, in quantities of 100,000 tons per year might have been obtained of this company, or some other, at even less than $1.25 per ton; but it is equally true that it might also have turned out, that, in the absence of such a contract as this with this company, the necessary amount of coal would have cost much more.

Coal in this country is indispensable to the operation of a railroad. Coal in large quantities and certain to be delivered to it when needed, is as necessary to continued and successful railroading as blood is to animal life; and hence ordinary prudence required a provision for coal to be made in advance. Theretofore, the company, as is shown by the answer, had *worked* mines owned and operated in connection with the road, the coal company being an adjunct to the railroad company. When this arrangement ceased, some other *sure* arrangement was necessarily made for supplying the wants of the defendant company.

Now, what principle of law or public policy can be invoked to render a contract of that character, honesly entered into for an honest end,

a void contract? How can the fact, if it be a fact, that neither from the contract, or from outside the contract, the Court below or this Court cannot tell which of the two companies contracting got the best of the bargain, make the contract void, or render it of such a character as that it may not justify the reduction of the rate? The sole and only question is, did the company defendant honestly enter into the contract and honestly consent to this discount, honestly believing it had a *quid pro quo*, that was sufficient to justify it in giving the discount? If it did, then there was no unjust discrimination, and whether the company made money or lost money by the contract is not important, and so it is not important to be able to find from "the contract itself, or outside of it," whether the consideration was in fact equal to the discount.

An unjust discrimination in rates is doubtless contrary to sound public policy, but the difficulty is to find out what is an unjust discrimination. It has been justly said, "that it is only when the discrimination inures to the undue advantage of one man in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination may be indulged in."

Hays vs. Penn. R. R., 12 Fed. Rep., 311.

The Court below tried to bring this case within the decision just quoted, by saying:

"The Marshall Company are dealers in coal in the same market, depending largely on the same rates of transportation for the profits on their business. The direct effect of a reduced rate to the Marshall Company was to reduce the profit on plaintiff's coal to the extent of such reduction."

To this, we say, this conclusion can be arrived at only by assuming as true what the second answer specially and with careful statements of fact undertook not only to deny, but to show affirmatively was untrue. Nobody will pretend that the necessary direct or indirect effect of a reduction of rates is to reduce the selling price of coal, for the party receiving the reduction might content himself with selling at the same price as though no reduction had been made, and certainly no Court has the right to hold that such was its effect when the party complaining nowhere alleges any such thing, and defendant had denied that plaintiffs had suffered any damage. There is not one word in the complaint that even remotely suggests that plaintiffs' damages arose from the fact that the price of coal or the profit on coal sold by the plaintiff was in the slightest degree affected by the fact that one is alleged to have paid $1, and the other 60 cents per ton for freight, except the statements made in the first three counts; find at fols. 5, 11 and 17 of transcript, the statement being the same in each and as follows:

"That during all of said time the output of the mines of said Marshall Consolidated Coal Mining Company increased, and ample facilities for the transportation thereof were at all times supplied to it by the defendant, and the amount of coal sold by said Marshall Company in said city of Denver was, as the plaintiff is informed and believes, greatly in excess of that sold, or which could have been sold at a profit by any of its competitors along the defendants Northern Colorado lines of railway."

This allegation is conspicuous for what it does not contain, rather than for what it does contain.

It avers plaintiff's belief "that the amount of coal sold by the Marshall Company is greatly in excess of that sold by any of its competitors," but there is neither allegation or intimation that such excess is the result of the acts complained of, nor is there any intimation that plaintiff could, under any circumstances whatever, while paying $1, or if he had paid but 60 cents freight, have sold, or could have procured for the purpose of sale in Denver, one pound more of coal than he did procure for sale and sell under the facts stated, for it will be observed that plaintiff was not a coal miner, or operating a mine; he was, as his complaint avers, engaged in the business of buying and transporting coal from the Fox Mine, nor is there any intimation or suggestion as to how much coal was or could have been mined in the Fox Mine, *non concessit*, but that he bought and shipped every pound that the mine produced. Much less is there any affirmative allegation (which was absolutely necessary to an allegation of actual damages suffered) that he could would or should have shipped, or sold a pound more of coal, or got a cent more a pound than what he did get, if this rebate to the Marshall Company had not been given. Nor is there anything in the fourth count that shows any damage suffered since. That count simply alleges that one party, under substantially similar circumstances, was charged more than another for the same service, and, therefore, he claims three times what he alleges is the actual damage sustained by him, though there is no facts alleged that show any actual damages suffered. It alleges that "the actual damages sustained and over-

charges paid by plaintiff is $9,437.31," which is the exact rebate of 40 cents per ton on amount of coal he shipped.

The statute referred to provides for a forfeit to the person aggrieved by unjust discrimination "*three times the actual damages sustained* or *overcharges* paid." But there can be no overcharge unless there is either a charge greater than what is fixed in the general schedule of rates or there is, with or without a schedule, an *unreasonable* charge. As to the first point, it will be seen that there is not a particle of proof, from any source that any person or corporation, other than the Marshall Company, had any rebate whatever, and the proof is that there were eight or ten other persons or corporations shipping coal from the same locality and at the same rate—$1—and hence there was no overcharge to plaintiff in the sense of his being charged more than the schedule rate, and as to an overcharge on the ground that it was unreasonably high, not only is there nothing of the kind alleged by plaintiff, but it was fully met by plaintiff and his witnesses, all of whom said there was no complaint to be made on that score. To conclude on this point, we say, since the plaintiff alleged no damage actually sustained, and since there is neither allegation nor proof that what he did pay was, under the statute, an overcharge, and since the record shows a fixed schedule of reasonable rates that everybody paid except one, it is clear the complaint stated no cause of action whatever.

Nor is there apparent to us any reason why a railroad company may not settle claims against it,

or against its property, and provide for its future wants by bargaining with those who hold such claims, and who are prepared to supply its wants; and that being so, we see nothing to prevent contracts of this character being set up to protect the company against charges of the kind set forth in this complaint.

Second—The second error assigned is in admitting the letter written by T. L. Kimball and the reply of E. R. Taggart thereto. We think there was error in this, because it is obvious, from Kimball's letter, that it was an answer to charges which are not set forth in Kimball's letter, and were not shown in evidence by plaintiff; and hence, the defendant not being apprised of an intention to introduce the letter, could not be required or expected to produce it, and the plaintiffs must be presumed to have been able to procure the same.

2d. The letter of Kimball was wholly irrelevant and immaterial, since the defendant had admitted that the contract referred to in that letter had been made, and the terms thereof had been set forth precisely as Kimball set them forth.

3d. It will be noticed also that only a part of the consideration for making the contract set up in the answer, is attempted to be given in Kimball's letter, and the inevitable tendency would be to prejudice the jury against the defendant, if this partial statement did not seem to warrant defendant's action.

4th. The introduction of Taggart's letter in reply can be justified, as we think, on no possible view to be taken of it. Taggart was both plaintiff and a witness. What Taggart said or wrote, as to

his conclusions from facts, was mere hearsay, and ought not to have been received, but, worse still, it was not only his conclusions, but it was a stump speech by way of argument, on the exact question before the Court, at the trial, viz., whether the conditions of shipment between the Marshall company and the plaintiff were identical or similar, and whether defendant company had violated the law.

On the first point he asserts the facts of exact identity of conditions on his own judgment. On the second, he avers that "highest legal sources of information had assured him that the contract in question was clearly in violation of law." It is perfectly clear that the jury may have been deeply impressed with this averment of fact, and this conclusion of law, drawn from the "highest sources," whatever those sources may be. Lastly, it is plainly to be seen that both his first letter, Kimball's letter and Taggart's reply, were all written by way of negotiating a settlement of the claim of Taggart against the defendant, and if so, then all these letters as well as all verbal utterances on that subject, were inadmissible against objections to their admission. To this we need cite no authorities. It cannot be denied that this letter of Taggart's was calculated to injure the defendant by influencing the jury against the defendant.

Third—The third, fourth and fifth assignments of error may be discussed together. The errors assigned are in refusing to allow the defendant to show by plaintiff's witnesses, Taggart and Rubridge, the cost of taking out coal and putting it on the cars, one of them being engaged in mining and taking out coal, and necessarily familiar with the

cost; such attempt being made on cross-examination of the witnesses. By referring to the record (fols. 65 to 68) it will be seen that Taggart (fol. 66) had already, against defendant's objection, testified and given in evidence Kimball's letter relating to the claim of defendant, that there was no unjust discrimination because of the fact that by the contract the Marshall company was bound to furnish to the defendant company coal at a price at which the Marshall company could not possibly make a cent of profit and on which, as it was claimed, it would lose more money than it would get under the rebate of 40 cents provided for in the contract. And the same was also true of the witness Rubridge. Under that state of facts it was clearly the right of defendant to inquire about, and to show, if it were able, what it did cost to mine and deliver on board of defendant's cars, the coal delivered under the contract. There could have been no question as to the right to this evidence had the second defense been allowed to stand, because it would have been exactly in the line of the allegations contained therein; and it is equally true when the said defense has been stricken out, for the obvious reason that an unjust discrimination or an unreasonable charge imposed, is actionable at common law. And hence the defendant having fully answered by denying generally and specially that it had been guilty of either offense, anything that tended to show that the discrimination was not *unjust* or that the charges were not *unreasonable* was admissible, and we know of no rule of law that can be invoked to prevent the defendant from showing facts that would tend

to show the character of the discrimination, and whether there had been in reality an unreasonable charge, by cross-examination of plaintiffs' witnesses. That it was not legitimate cross-examination no one has ever yet even suggested, and if it had been it could not have been sustained. In the Court's decision on the demurrer to the second defense, we have seen that it was held bad because it was said that, under the contract, it "could not be ascertained from the contract or otherwise" whether the consideration in the contract for reduced rates was sufficient to make up the discount. But, we submit, that having denied the unjust discrimination, we were entitled to try to prove that it was not unjust. The decision itself inferentially says, if, from the contract or otherwise, you could prove the consideration mentioned in the contract sufficient to make up the discount, then the contract would be a defense. The offer was made to show that they were sufficient, and if it had been shown, to the satisfaction of the Court or jury, it would have been as effective to defeat the action as if the second defense had stood, because the effect of our general and specific denial was to deny that plaintiff ever had a cause of action, and anything that tended to prove that the discrimination was not unjust was admissible. The Court having thus erred in admitting improper evidence, referred to in assignment 2, and having also erred in rejecting competent and proper evidence, referred to in 3, 4 and 5, we submit the judgment should be reversed because the rule is, that the rejection of competent evidence that would bear in the *slightest degree upon the issue* or the re-

ception of incompetent or improper evidence of a like character is ground for reversal.

In Church vs. Hubbart, 2 Cranch., 187–239, this Court said: "If the Court erred in admitting as testimony papers which ought not to have been received, the judgment is, of course, to be reversed and a new trial awarded." So in Smith vs. Carrington, 4 Cranch., 69 and 70, this Court said of improper evidence admitted: "Into its importance or operation this Court cannot inquire. It was improper testimony, and *a verdict founded on improper testimony cannot stand.*" In Watt vs. Starke, 101 U. S., 247–251, the Court quotes with approval the rule we are contending for, as announced by the English Court of Chancery in Barker vs. Ray, 2 Russ, 75: "It has been ruled over and over again that if, on the trial of an issue, a Judge reject evidence which ought to have been received or receive evidence which ought to have been rejected, though in that case a Court at law would grant a new trial, yet if this Court is satisfied that if the evidence improperly received had been rejected, or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new trial merely on such grounds."

To the same effect is—

Clark vs. Vorce, 19 Wend., 232.
Myers vs. Malcom, 6 Hill, 292.
Worrall vs. Parmerlee, 1 N. Y., 519.
Hartford F. Ins. Co. vs. Smith, 3 Colo., 422.
F. & M. Bank vs. Whinfield, 24 Wend., 419.
Stetson vs. City Bank, 2 Ohio St., 180.
Spanagel vs. Dellinger, 38 Cal., 278.
Baird vs. Gellett, 47 N. Y., 187.

Fourth—The sixth error assigned is in the Court's refusing to allow in evidence the release given by former owners of the Marshall coal mine from damages, etc. (fol. 82). Here again it will be seen that the witness had testified, without objection by anybody, to the fact of there being a bond of indemnity against the suit for damages and a release of the defendant company from all damages that could be had in the suit by the mine owners, such damages being secured by attachment on the property held by defendant company, and had shown that a release had been made and delivered to the defendant company. Such release was then offered in evidence and rejected. This release from liability to damage was one of the alleged considerations upon which, and in return for which, defendant had allowed the rebate, and, if such release was a part of the transaction which tended to show that the conditions and circumstances between the Consolidated Mining Company and other coal companies were dissimilar, such evidence was certainly admissible, and, as already stated, evidence of this character was good with or without the second defense. Clearly, then, this was competent and important evidence to go to the jury, and should have been received.

Fifth—The seventh and last error assigned is, in refusing to grant a new trial and in entering judgment, because there was no sufficient evidence to support the verdict, and especially to sustain the amount of damages found by it.

To sustain this verdict, it must appear that there was, first, evidence sufficient to warrant a finding that defendant, either under the statute or at com-

mon law, had been guilty of unjust discrimination or overcharges against plaintiff to his damage; and, secondly, the amount of damage actually sustained. On the first point, we call attention to the fact already adverted to, that the charge of $1 per ton was shown to be a *fair* tariff by the plaintiff's own witnesses. So in that, there was no overcharge. Secondly, there was no unjust discrimination shown, damaging to the plaintiff, in any view of the evidence that can be taken, for it was neither alleged, proven, or even claimed that plaintiff had ever sold a pound of coal less, or at a less price, than he would have sold had no rebate been allowed; nor was there any evidence whatever, of any kind whatever, that ever tended to show *actual* damage of any kind to the plaintiff. Even had there been no excuse shown for this difference of rate, it would still have been true that a less rate paid by one shipper is no damage to another paying a higher rate, and does not necessarily make the higher rate either an overcharge or an actual damage; and if it did thus damage plaintiff, it should have been shown.

We admit that some Courts of this county have held that the statutes prohibiting discrimination are but declaratory of the common law, and, that being so, a complaint which states a cause of action under either the statute or common law, would be good; and so if the proofs were sufficient to make out a case under either, that would be all that was required. It must also be true that a defense of any character that would show, or tend to show, that the discrimination was not unjust, and that plaintiff suffered no pecuniary dam-

age, must be good; and so, on denial of facts set out in the complaint, all evidence tending to show the reason for the discrimination, and whether it did or did not damage plaintiff, was admissible, the burden being on plaintiff to show damage.

Both common sense and common law unite in affirming the soundness of the views already quoted from the case of Hays vs. Pennsylvania Co., and in the decision of the Court in the case of Scofield vs. Railway Co., 43 Ohio St., 571–619, it is said:

"The important point to every freighter is that the charge shall be reasonable, and a right of action will not exist in favor of anyone, unless it be shown that unreasonable inequality had been made to his detriment. A reasonable price paid by such a party is not made unreasonable by a less price paid by others, as said by Crompton, J., to the plaintiff upon the trial of such a suit, the charging another party too little is not charging you too much."

Gaston vs. B. & E. R. R. Co., 1 B. & S., 112, 154, 165.

"Discrimination, if reasonable and founded on grounds consistent with public interest, is allowable."

Hersh vs. North. R. R., 74 Pa. St., 181.

Chicago, etc., R. R. vs. People, 67 Ill., 11.

In Fitchburg R. R. Co. vs. Gage, 12 Gray, 393,-399, the Court, after discussing the question at common law, says:

"The principle derived from that source is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual, consists in the restricted right to charge, in each particular case of service, a reasonable compensation,

and no more. If the carrier confines himself to this, *no wrong can be done* and no cause afforded for complaint. If, for special reasons, in *isolated* cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals, for a certain time, or in certain quantities, for less compensation than what is the usual, necessary and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief. * * * The defendants do not deny that the charge made on them for the transportation of their ice was according to the rates established by the directors of the company, or assert that the compensation claimed is in any degree excessive or unreasonable; certainly, then, the charges of plaintiffs should be considered legal as well as just, nor can the defendants have any real or equitable right to insist upon any abatement or deduction, because, for special reasons, which are not known, and cannot, therefore, be appreciated, allowances may have been conceded in particular instances or in reference to particular series of services to other parties."

If this be sound law, then *a fortiori* it must be true that, in the case at bar, plaintiff, under circumstances disclosed by the testimony, has no right to recover anything, much less at the full rate of rebate on coal carried for only one coal company, and when no lessening of the price of coal is claimed and no lessening of the amount of coal plaintiff could have sold is claimed. So, too, in the case of McDuffee vs. R. R. Co., 52 N. H., 451, the Court says:

"A service at a price that would otherwise be reasonable may be made unreasonable by an unreasonable discrimination. There might be cases

where persons complaining of such a violation would have no cause of action, because they would not be injured. There might be cases where the discrimination would be injurious; in such cases it would be actionable."

In Ransome vs. Eastern C. Ry., 1 C. B. N. S., 437, it was held that, in determining whether a company has given undue preference to a particular person, the Court may look to *the interests of the company*, and then adds:

"In other words, if the charge on the goods of the party complaining is reasonable, and such as the company would be required to adhere to as to all persons in *like condition*, it may nevertheless lower the charge to another person, if it be to the advantage of the company, not inconsistent with the public interest and based on a sufficient reason. It is obvious that the intention of the defendant, in this instance, was not to discriminate against the complainants in favor of any person of the same place and *in the same condition*. His object was to get business for his road from persons at a distance from its terminus, which would otherwise reach their destination by a different route. Under these circumstances we cannot see that the contracts complained of are against public policy or that the complainants have been damaged if the charges on their goods were reasonable."

This, we think, is sound law, and especially applicable to the case at bar, since there is not even a pretense of evidence of damage "*actually sustained*," except the simple fact, that under the facts and circumstances shown in this case, a rebate of 40 cents per ton was allowed the Marshall company, which rebate in nowise affected either the price or the amount of coal sold by the plaintiff, and

affected him in no manner whatever, unless it was to hurt his feelings.

We have said that some of our Courts hold that laws against discrimination are but declaratory of the common law, but we submit, the question is still an open one, and certainly an open one in this Court. The subject was touched upon in the express company cases, 8 Fed. Rep., 802, and 10 Fed. Rep., 210, and 117 U. S., 1, but was by no means decided.

In Messenger vs. Penn. R. R., 36 N. J. L., 407, the Court holds that way, but apparently on the sole authority of Smith, in his Leading Cases, p. 174, and the case of Stanford vs. R. R. Co., 24 Pa. St., 378. As to the former, it is Smith's opinion only, while as to the latter case, it was clearly decided on the provisions of the charter of the company, which required it to transport articles, and "so that equal and impartial justice shall be done to all owners of property."

We think it can hardly be claimed that the point is really decided in any of the cases we have referred to, while it is an undisputed fact that the English authorities hold that the carrier may discriminate at common law without being held liable to repay the difference in amounts received, and this is the view taken of it in the case of Johnson vs. Railroad Co., 16 Fla., 623, and the recent case of Cowden vs. The Pacific C. S. S. Co., 94 Cal., 470, which appears to be a very well considered case, holding that at common law a complaint that does not show the charge to be unreasonable does not state a cause of action, even though it does state that the carrier charged one man more

for the same service than he did another. Now, if this be true, there was no cause of action stated in the case at bar, and, as no unreasonable charge was proved, but quite the contrary, it would seem there was neither cause of action stated or proved, and even if it be held that an allegation of discrimination, either under the statute or common law, without alleging damage suffered thereby, would be the statement of a cause of action, still there is error in this verdict, since no case can be found at common law that gives plaintiff the right to recover the amount of discrimination against him, and no case can be made under our statute except upon proof of overcharges and the amount or actual damages sustained, neither of which was shown in this case. On this record the verdict and judgment thereon can be sustained only by the assumption that plaintiff suffered damages in the sum stated from an overcharge to that amount or sustained actual damages to that amount by an unjust discrimination against him. The fact cannot be assumed, because, as already said, plaintiff and his witnesses admit that the charge of $1 is not an overcharge or in anywise unreasonable, and, as to the unjust discrimination, there was neither allegation nor proof that even tended to show that the amount of coal sold by them was lessened or the price at which it was sold was reduced, or that plaintiff could have sold more or at a higher price, had no discount or rebate been made to the Marshall company, and as no damages to the plaintiff would appear to be possible from the discount, except upon one or other of these grounds, we think it clear to a demonstration that plaintiff failed to

show any damages sustained by them for which any recovery could be had, and the judgment for damages never sustained, ought to be reversed.

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IN

The Supreme Court

OF THE

United States.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VS.

E. R. TAGGART,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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Attorneys for Defendant in Error.

C. J. KELLY, Printer, Denver.

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BRIEF OF DEFENDANT IN ERROR.

The statement of facts made in the brief of the plaintiff in error may be taken as a fair epitome of the transcript of record in this case. We do not consider that it fairly shows all that took place at the trial, but it does show the substantial allegations of the pleadings and practically all the testimony preserved in the bill of exceptions. The latter does not purport to contain all the testimony given at the trial, does not contain any of the instructions

given or refused, nor the opinion of the Court upon the motion for a new trial, and so we can only consider such matters as are fairly presented by the record and the bill, as far as it goes. Any differences between ourselves and counsel for plaintiff in error as to what facts were proved at the trial will be considered when they arise in the course of the argument. No assignment of errors was made in the Court below which is contained in the transcript of the record, and the first and only assignment is found in the brief of the plaintiff in error beginning upon page 18. These errors are seven in number and are discussed by counsel under five heads, the third, fourth and fifth assignments being discussed together. We desire to present in this argument a reply in detail to the points argued by counsel and, in addition thereto, to insist that there is no assignment of errors in accordance with the statutes of the United States and the rules of this Court.

I.

Sufficiency of the Assignment of Errors.

Section 997 of the Revised Statutes of the United States is in the following words: "There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with the citation to the adverse party." The record in this case which was returned into this Court does not contain an assignment of errors or a prayer for reversal, nor is there in the brief, unless the argument of counsel for the plaintiff in error be

considered as a prayer for reversal, the prayer called for by said section. It is true this Court has held, in a number of cases, that a failure to file the assignment of errors in the Court below, and to have the same transmitted to this Court with a transcript of the record, is not a sufficient ground on which to dismiss a writ of error for want of jurisdiction.

School District vs. Hall, 106 U. S., 428.
Gumbel vs. Pitkin, 113 U. S., 545.

But this is the extent to which the Court has gone in construing that section of the statute.

Clause 4 of rule 21 of this Court is as follows:

"When there is no assignment of errors, as required by Section 997 of the Revised Statutes, counsel will not be heard, except at the request of the Court; and errors not specified according to this rule will be disregarded; but the Court, at its option, may notice a plain error not assigned or specified."

We take it that this rule, in connection with the authorities just cited, means that, in a case like this, the Court will not consider an assignment of errors filed for the first time in the brief of counsel, except, after an inspection of the record, it is convinced that there is serious question as to the correctness of the judgment below.

We understand there has here been no request by the Court that counsel for plaintiff in error be heard While a failure to file an assignment of errors in accordance with the requirements of Section 997 is not fatal to the jurisdiction of the Court, it is, we think, such a non-compliance with the plain requirements of the statute that the Court should not, ex-

cept upon weighty considerations, permit it to go as though the statute had been complied with. The object of clause 4 of rule 21 must be to punish a violation of the statute with refusal to consider errors assigned, unless they be gross or the case be one of great public importance. Congress must have had some definite object in view when it passed the above section, and this Court should give it effect as far as possible. Failure to file assignment of errors in accordance with the requirements of the section should preclude counsel from being heard, unless it be a case of the utmost importance, and they make a showing to this Court that failure to file the assignment was due to some excusable cause. Where counsel simply neglect to make the assignment of errrors, and file their brief without making any excuse therefor, and presume that the Court, in accordance with its rule, has made a request that they be heard, the case should be affirmed when the matter is called to its attention.

Not only this but the errors assigned by counsel are not specific, and are not in accordance with the other requirements of the Supreme Court rules. Perhaps the best comparison that can be made with the assignment of errors in this case is that contained in a late decision of this Court.

Van Stone vs. Stillwell & Bierce Mnfg. Co., 142 U. S., 128.

In that case there was no assignment of errors filed with the record as provided by Section 997, but counsel for plaintiff in error attached one to their brief in about the same manner as has been done in the case at bar. Eight errors were assigned of about the kind and character set up by counsel

for plaintiff in error in this case. Mr. Justice Lamar, in delivering the opinion of the Court, said:

"It is manifest from an inspection of this assignment that it is entirely too general to meet the requirements of the 21st rule of this Court. It was evidently framed with reference to the Code practice of the State in which the cause was tried; but nothing is better settled in this Court than the proposition that 'in regard to * * * bills of exceptions Courts of the United States are independant of any statute or practice prevailing in the Courts of the State in which the trial was had.' Fishburn vs. Chicago, Milwaukee, etc. Ry. Co., 137 U. S., 60. We shall, however, refer to the errors assigned, in detail, more for the purpose of showing the insufficiency of most of them, under the rule, than to go into the merits of the case upon the questions thus attempted to be raised."

The Court then discusses in detail each of the eight errors assigned, and shows how they fail to comply with the rule. Following that decision we shall discuss the errors here assigned in detail for the purpose of showing the insufficiency of each; but, as we are not at liberty to presume that this Court will take our view of the matter, we shall be compelled to discuss the merits of the case a little more at length than was there done by Mr. Justice Lamar.

II.

Errors Assigned Discussed in Detail.

First—The Court below is charged with error in sustaining the demurrer to the second answer of the defendant which sets up the facts on which the agreement, also set forth therein, was made.

This error fails to disclose to this Court with sufficient certainty just what is intended to be reached by it. It says the Court erred in sustaining the demurrer to the second answer of the defendant which sets up the facts on which the agreement, also set forth therein, was made. It does not attempt to set up any of the facts referred to in the answer, nor state what the agreement set forth therein actually was. Subdivision two of the second clause of Rule 21 says that the specification shall set out separately and particularly each of the errors relied upon. The substance of this assignment is that the Court erred in sustaining the demurrer to the second answer of the defendant. The words which follow do not specify or particularize at any greater length. They are simply surplusage. In the case ab ve referred to in 142 U. S., the third assignment of error was that "The Court erred in refusing to sustain the demurrer to the evidence offered by plaintiff in error," and the eighth assignment of error was that "The Court erred in overruling the demurrer to the evidence." The Court held that specifications of this kind were too indefinite.

But passing from this, we do not think the Court can consider the action of the Court below in sustaining the demurrer to the second defense for another reason. The complaint of the plaintiff stated, in substance, that the defendant company had been guilty of extortion and unjust and unfair discrimination in its freight rates. In answer to this, the defendant set up, first, a general and special denial, and, second, a justification for the rates actually charged the plaintiff. It is clear that the matter set forth in the second defense could be

proved under the general denial. The complaint alleging unfair and unjust discrimination, the defendant had a right, under its general and special denial, to prove any fact which tended to show that the rates actually charged were not an unfair and unjust discrimination. If the contract set up by the answer was a defense at all, it was simply pleading evidence that could be proved under the general denial just as well as under a special defense. Considerable variety of opinion is found in adjudicated cases and among text writers as to just what can be proved under a general denial under the Code, but no case in any of the States has ever announced principles which would preclude the defendant in this case from proving the facts set up in his second defense. The true rule is announced by Mr Pomeroy, in his excellent work upon the Code. He says, "A plea by way of confession and avoidance *admitted that the cause of action alleged did once exist*, and averred subsequent facts which operated to discharge or satisfy it. The new matter of the codes *admits that all the material allegations of the complaint or petition are true, and consists of facts not alleged therein, which destroy the right of action, and defeat a recovery.* To sum up these conclusions, the classification of and distinction between defenses at the common law depended upon the intrinsic, essential nature of the causes of action and of the defenses. The analogous classification and distinction between defenses admissible under a denial, and those which are new matter, in the new procedure, depend, primarily, upon the construction of the complaint or petition, and the material averments of fact which it contains. All facts which

directly tend to disprove any one or more of these averments may be offered under the general denial; all facts which do not thus directly tend to disprove some one or more of these averments, but tend to establish a defense independently of them, cannot be offered under the denial; they are new matter, and must be specially pleaded."

Pomeroy Remedies and Remedial Rights, Sec. 673.

The sections following the one just cited are filled with numerous illustrations of what is meant by the language quoted. In this case the averments of the complaint were that the defendant charged extortionate rates and was guilty of unfair, unjust and illegal discrimination against the plaintiff. The general denial admitted any proof showing that there was no extortion, that the discrimination was not unjust, illegal or unfair.

It is well settled by numerous decisions of this Court that where an answer is interposed containing a general denial and special pleas in avoidance, the sustaining of a demurrer to the special pleas, if their allegations could be proved under the general denial, is not error. We will call the attention of the Court to several of them for the purpose of illustrating what can be proved under a general denial as well as to show that there is no error in overruling a special defense under such circumstances.

In Railroad Co. vs. Bank of Ashland, 12 Wallace, 226, a demurrer to a plea was sustained and error assigned thereon. Mr. Justice Bradley, in delivering the opinion of the Court, said: "This point is fully presented in the last plea on which

issue was taken, and the defendant can, therefore, receive no harm, though the demurrer to its first plea was wrongly sustained." This was followed and approved in—

Grand Chute vs. Winegar, 15 Wallace, 355.
Chambers County vs. Clews, 21 Wallace, 317.
County of Wilson vs. National Bank, 103 U. S., 770.

In the case of Nehema County vs. Frank, 120 U. S., 41, the point which we are insisting upon was clearly and lucidly set forth by Mr. Justice Matthews. That was a case in which action was brought against a county upon certain bonds, and a variety of defenses was set up by the county to defeat the claims of the holder. The point of pleading presented was stated by Mr. Justice Matthews, as follows:

"The averments in that portion of the answer stricken out are, in substance, 1st, that the bonds were illegal and void because not issued to a company authorized by the statute to receive them; and, 2d, that they were illegal and void because issued in excess of the amount of ten per centum of the assessed valuation of the taxable property in said precinct. The answer of the defendant, in addition to the matters stricken out, contains the following: * * * This clause in the answer remained and formed the issue which was tried. It is a general denial of each and every allegation of the petition, as no allegation of the petition was otherwise admitted in the answer. It, therefore, put the plaintiff upon proof of every fact necessary to constitute the cause of action set out in his petition, and embraced a denial of the legality and validity of the bonds, and the lawfulness of their issue and delivery. It required the plaintiff to show by competent proof that he was the

owner of the coupons sued on, taken from bonds in fact executed by the defendant, issued in accordance with law, and delivered to a party competent to receive the title. It permitted proof on the part of the defendant of every fact which tended to establish that the bonds were illegal and void. It follows, therefore, that every defense which was open to the defendant under that portion of the answer stricken out was equally open to it under the answer as it stood at the trial. The plaintiff obtained no advantage, and the defendant suffered no detriment, by the ruling of the Court requiring that portion of the answer to be stricken out. The action of the Court in granting the motion did not, therefore, prejudice the defendant."

This case is conclusive upon both points made by us, namely, that the matters set up in the special defense could have been proved under the general denial, and that no error was, therefore, sustained by the defendant in the Court's striking out the special defense. Under the allegations of the plaintiff's complaint in this suit he was compelled to prove that the rates charged by the defendant for the transportation of his coal amounted to extortion and to unjust, illegal and unfair discrimination. The defendant, having denied these facts, could prove anything which tended to show that they did not amount to extortion or to an unjust, illegal and unfair discrimination. We cannot state it half so well or half so forcibly as Mr. Justice Matthews has done in the words just called to the attention of the Court.

And again, in the case of

Coffee vs. Groover, 123 U. S., 1,

the same proposition is announced. Mr. Justice Bradley there says:

"The first ground of error is not raised on the record in such a manner as to avail the defendant. The matter of defense involved therein was set up by two pleas: first, a plea of former recovery; and, secondly, a plea to the jurisdiction of the Court. These pleas were overruled on demurrer, but for what reason is not stated. The Supreme Court of Florida, however, in its opinion, very properly says: 'In ejectment all legal defenses may be made under the plea of not guilty, and the special denials mentioned in the statute. McClelland's Dig., 481. Special pleas of matters affecting the legal title, or in estoppel, only incumber the record and tend to embarrassment. Wade vs. Doyle, 17 Fla., 522; Neal vs. Spooner, June Term, 1883, (20 Fla. 38). They should be struck out by the Court *sua sponte*, or on motion, or on demurrer, because they are not proper pleas; but a judgment sustaining a demurrer will not preclude proof, on the trial, of the facts so improperly pleaded.' Coffee vs. Groover, 20 Fla. 64, 78. The pleas being overruled no attempt was made on the trial to set up the defense by proof of the former judgment relied on. This branch of the case, therefore, may be laid out of view."

We trust that this Court, upon this authority, will dispose of the first assignment.

An examination of the transcript will show that so far as the bill of exceptions goes, no testimony was submitted by the defendant below to sustain its case. The record discloses, however, that on cross-examination of the plaintiff's witnesses, nearly all the facts necessary and material to make out the defense set up in the special plea were introduced. Whether the defendant, by failing to

introduce any testimony, desired to rely upon the action of the Court in sustaining its special defense, or whether it was satisfied that all material facts necessary for the proper determination of the case had been put in by plaintiff's witnesses, we do not know; but the fact remains that it did fail to introduce any testimony, and under the authority of the above case, it must be held to have waived its special defense. It had pleaded it specially together with a general denial, and the same matter being proper under the general denial, its failure to offer proof of it after its special defense was overruled, is a waiver of the error, if any was committed.

Counsel for plaintiff in error has unknowingly admitted in his brief the very point for which we are contending. On page 37 thereof we find the following language:

"There could have been no question as to the right to this evidence had the second defense been allowed to stand, because it would have been exactly in the line of the allegations contained therein; and it is equally true when the said defense has been stricken out, for the obvious reason that an unjust discrimination or an unreasonable charge imposed is actionable at common law. And hence the defendant having fully answered by denying generally and specially that it had been guilty of either offense, anything that tended to show that the discriminaton was not *unjust* or that the charges were not *unreasonable*, was admissible; and we know of no rule of law that can be invoked to prevent the defendant from showing facts that would tend to show the character of the discrimination, and whether there had been in reality an unreason-

able charge, by cross-examination of plaintiff's witnesses. * * * *But, we submit, that having denied the unjust discrimination, we were entitled to try to prove that it was not unjust.*"

The italics of the last two lines are ours and state the whole thing in a nutshell. Under its denial the defendant was entitled to any proof showing that the discrimination was not unjust. Having failed to offer proof of its special defense, it cannot now be heard to question the correctness of the Court's decision on the demurrer.

Turning, however, to the action of the Court below in sustaining the demurrer on its merits, we think this Court must be convinced that the ruling was clearly right. Counsel in his argument contends most strenuously for the proposition that the complaint of the plaintiff states no cause of action, and that if it did the special answer was a complete defense thereto. We prefer to notice both these propositions under the seventh assignment of error and will, therefore, pass for the present the merits of the action of the Court in sustaining the demurrer.

Second—The second assignment is that the Court erred in admitting in evidence the letters of E. R. Taggart and T. L. Kimball.

This, certainly, cannot be considered by the Court. The second subdivision of clause 2, Rule 21, of this Court, provides *inter alia:* "When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected." No attempt is made in this assignment to give the

substance or even the shadow of what the letters of Taggart and Kimball were. It is simply stated that the Court erred in admitting these two letters. To ascertain what is in the letters, recourse must be had to the original transcript. They are not even quoted in the brief.

And on looking at the record to ascertain what the letters are, and the circumstances under which they were admitted in evidence, we find that no sufficient explanation was offered, even though the letters were inadmissible. The record reads as follows: "Plaintiff here offered in evidence plaintiff's letter to T. L. Kimball, and Kimball's reply, to which defendant's attorneys objected, since the demurrer to the second answer had been sustained; any statement of the way in which the defendant has acted relating to that defense shall be excluded because immaterial, irrelevant and incompetent; which objection was by the Court overruled and defendant then and there excepted."

Transcript of the Record, page 36, fol. 65.

We do not see how any Court, upon that objection being made, could have failed to overrule it. Counsel for defendant only claimed that the letters were inadmissible, because the demurrer to the second defense had been sustained. The Court, under such an objection, could not be presumed to go back and reargue the demurrer to the second defense for the purpose of ascertaining whether the letters were admissible. It would simply say, as the Court did in this case, "If that is your only objection we will not review or revise our previous ruling." It is not objected that the letters are immaterial or irrelevant for any other purpose

save and except that the second defense had been stricken out. The rule is elementary that an objection to the admission of testimony must clearly state to the trial Court the reasons upon which it is based so that the Court may intelligently pass upon those reasons. Unless this is done the appellate tribunal will refuse to consided the error. A clearer case for the application of this rule could not be presented than the one at bar.

1 Thompson on Trials, Sec. 693.

But on turning to the letters themselves, we find that they were admissible under the pleadings in the case. They consisted of a letter written by Mr. Kimball to Mr. Taggart in reply to a letter which Mr. Taggart had previously written to Mr. Adams, the President of the Company, and Mr. Taggart's reply to Kimball's letter. The purpose of introducing them was to show the date at which Taggart ascertained the discrimination which had been made against him and what he did immediately thereafter. This was explained to the Court, and for these reasons the letters were admitted.

The defendant on March 5, 1889, almost a year after its original answers were filed, interposed the plea of the statute of limitations (fol. 58). The act of 1885 requires those who have been injured by its violation to commence their actions within a year after the causes thereof shall have accrued, and counsel for the defendant doubtless supposed that a part, at least, of the plaintiff's cause of action was barred by the lapse of time. To that plea the plaintiff replied and *inter alia* alleged that the defendant concealed its discrimination in favor of the

Marshall company and against the plaintiff, and that the action was brought within a year from the time when he acquired knowledge of its existence (fol. 59). This was a proper reply and offered a perfect excuse in law for any supposed neglect in bringing suit.

Bailey vs. Glover, 21 Wall., 342.
Wilkinson vs. Verity, L. R., 6, C. P., 206.
McMahon vs. Sloam, 12 Pa. St., 229.
S. C., 51 Am. Dec., 601.

Now, the first thing which plaintiff did after receiving information of the existence of defendant's rebate contract with the Marshall company was to put himself in communication with the railway officials. He made formal demand upon them for restitution, and this was a proper preliminary to the commencement of legal proceedings, whether made so by statute or not. It was the very best evidence of the exercise of diligence, hence the letters were not only admissible but it became the duty of the plaintiff to offer them, and if he offered one it was only fair that he should offer the entire series. Besides this, the plaintiff had pleaded a demand and refusal in each count of his complaint, which had been put in issue by the general denial of the defendant. This demand and refusal was made by letters to and from the railway officials, and had we failed to substantiate our allegations by appropriate testimony, the plaintiff in error would now be here insisting that the defendant in error had not made out a case for the consideration of the jury.

The reply of Mr. Kimball (fol. 67) and the answer of Mr. Taggart thereto were the only let-

ters of the series to which objection was made. They should be taken in connection with the letter of July 25, 1887, sent by Mr. Taggart to the President of the defendant company, for they relate to the same subject matter and constitute with it the entire demand and refusal. Why counsel should have objected to the last two and not to the first one is difficult to tell.

Mr. Kimball's letter of August 18, 1887, was an important piece of testimony, not only because it is, in effect, a refusal to comply with Mr. Taggart's very just demand, but also because it gives the reasons which led to the company's conclusion that its contract with the Marshall Company was not unjust or discriminative. It will be noticed that Mr. K. states *inter alia* that the allowance of *the rebate was upon Denver deliveries only*, which is important, not only because the discrimination was confined to the only market in which the plaintiff did business and where he could, in consequence, suffer injury, but for the additional reason that (as will be noticed hereafter) the contract unearthed by the Pacific Commission provided for the rebate only in the event the Denver deliveries should annually equal or exceed 200,000 tons in amount. Mr. Taggart's reply was important in addition to the reasons already given, because it notified Mr. Kimball of his dissent from the former's views and at the same time gave him a reasonable period in which to further consider the propriety of the demand.

The letter of Mr. Taggart to President Adams (fol. 73), and to which that of Kimball was a reply, was as before stated, offered and received without

objection. It, however, contains a clause which has evoked the loudest complaint of counsel. It is that clause in which Mr. Taggart says, that he is advised by "the most competent legal authority here," that the rebates are unlawful, etc. This statement, counsel thinks, may have had great effect upon the jury, and swerved them from the path of rectitude and right. It is true that a similiar statement appears in Mr. Taggart's letter of August 20th, to which counsel did object, but not for that reason. It is difficult to determine how the clause in the letter objected to, could have operated to the detriment of the defendant, in view of the fact that a similar clause was before them, absolutely without objection, in another letter. It is yet not more difficult to determine how the letters, which were necessary testimony, could have been introduced except as entireties. We know of but one way in which that could have been effected. Had counsel made that objection then, we could and would have consented to the excision of the hated feature, but he did not.

But we deny that the letters were for any such reason or any other reason incompetent. The authorities cited by counsel, simply establish or recognize the elementary principles that the admission of improper evidence to the jury is error; a proposition which no sane man will dispute.

Suppose, that instead of a series of letters constituting the demand, Mr. Taggart and one of the railway officials had met and orally discussed the controversy, in which the former had demanded and the latter had refused recompense for the discrimination. Suppose, further, that plaintiff, in

the course of that conversation, had made the statement that he was advised by the highest legal authority that he had a good cause of action, etc., would counsel contend that because the fact was disclosed by the witness in detailing the conversation therefore there was error, since the jury might have been influenced thereby? We could not have asked the witness for conclusions. We would have been compelled to call for the conversation, and the witness would have been compelled to have disclosed the whole of it. Surely, the rule cannot vary because the demand was in writing instead of by parol.

The letter of Mr. Kimball to Mr. Taggart gives many reasons for his position that the conduct with the Marshall company was not in derogation of the plaintiff's rights. As well might we have insisted, before it went to the jury, upon the suppression of those reasons as tending to influence the jury. Mr. Teller's real objection was that his affirmative answer had been held obnoxious to demurrer, therefore defendant's action concerning that defense became immaterial. Should he not be here confined to the discussion of that objection?

But if the effect of these letters upon the jury were likely to be pernicious, counsel had an ample remedy in the Court below. He was at liberty, nay, it was his duty, to request the trial judge to instruct the jury that the letters were only intended to prove demand and refusal, and they must not in anywise be influenced by the other recitals. *Did he not do so?* For some reason, he has not cared to incorporate the charge of the Court in the bill of instructions, and it is our duty to

assume that the trial Court took good care that the cause of the defendant was not jeopardized by improper testimony or unwarranted inferences.

Counsel now urges three specific objections to Kimball's letter, not one of which was ever called to the attention of the trial Court. The first is that it was evidently in answer to one written to Mr. Adams, and the letter of Adams was not introduced. If there is any merit in this objection it is cured by the fact that the defendant himself, upon cross-examining the witness Taggart, introduced the letter of Adams.

The second objection to Kimball's letter is that the defendant had admitted that the contract referred to in that letter had been made, and the terms thereof had been set forth, precisely as Kimball set them forth. If this is true, the error that was committed, if any, was in defendant's favor by the plaintiff's proving the contract upon which the defendant relied as a defense; or, again, it was cumulative evidence and it was within the discretion of the Court whether it should be admitted or rejected.

A third objection to Mr. Kimball's letter is that it contains only a part of the consideration for making the contract, and this fact might tend to prejudice the jury against the defendant as to the balance of the consideration. Since the defendant was permitted to cross-examine Mr. Taggart and Mr. Rubidge, so as to prove clearly all the considerations of the contract, the letter could not have injured defendant, and was also evidence that the contract relied upon by the defendant was based upon a valuable consideration, and thereby was

evidence in the defendant's favor. We cannot conceive of any theory upon which the letter of Mr. Kimball was injurious to the defendant. It stated the defendant's ground for making the discrimination and was clearly a part of the defendant's case. The plaintiff was not at liberty to offer extracts from it, but was perforce compelled to offer it as an entirety or not at all.

In regard to the letter of Mr. Taggart, as before stated, the main object of its introduction was to prove the date at which he came into possession of the facts concerning the discrimination. It also showed a demand upon his part for a return of the illegal charges. A demand was necessary before he was entitled to recover and the best evidence thereof was the writing. The letter of Mr. Kimball, as a statement of the company, setting forth its reasons for making these charges being admissible, the plaintiff's reply thereto became evidence, it being a part of a connected correspondence. No hint of a settlement or compromise on the part of the plaintiff is made in either letter. It simply states that he has paid these excessive charges and demands them back. There is nothing that could be construed by the jury that the defendant admitted any liability or was attempting to compromise the same.

1 Thompson on Trials, Sec. 835.

The whole sum and substance of the correspondence is that Mr. Taggart wrote to the company calling its attention to the fact that he was being discriminated against, demanding that it should cease and he be repaid whatever damages he had sustained in the shape of extra charges, and

the defendant refused to accede to his demand and gave its reasons for so doing. Unless testimony of this kind is admissible we are at a loss to conceive how demands and their refusal against individuals or corporations can be proven.

Third—The third, fourth and fifth assignments of error are here discussed together.

These assignments come nearer complying with the rules of this Court than any found in the brief. They are all based upon testimony excluded, and attempt to set forth the substance of that testimony. The third and fifth, however, do not set forth the full substance of the testimony so excluded, but a mere attempt at the same, which can scarcely be understood without a further reference to the transcript. The object of an assignment of error is to enable the Court to ascertain what is claimed by the injured party so that it may see whether or not his claim is correct. It must, in itself, be specific and certain, containing matter which, by its mere statement, puts the Court in possession of facts from which a reasonable understanding of the controverted point can be reached.

The fourth assignment, taken by itself, amounts to nothing. It simply says that the Court erred in not allowing the witness Rubidge to answer a certain question, and does not state what the witness would have answered, had the question been put. Unless this is done, the assignment will not be considered.

Packet Co. vs. Clough, 20 Wallace, 528.
Railroad Co. vs. Smith, 21 Wallace, 255.

So that this assignment, standing in the shape it does, without attempting to state or show what the witness would have testified to had he been permitted to answer the question, may be laid aside.

The fifth assignment, however, is probably intended to cover this defect of the fourth, but it, as already stated, does not comply with the rule. The offer made in the bill of exceptions is very short, and could have been copied into the specification of errors without inconveniencing counsel, or making his brief too long, and it was surely due the Court that this should have been done.

Turning to the assignments themselves, we find that the third is based upon the refusal of the Court to permit the witness Taggart to testify whether he knew what it cost to get out a ton of coal and put it on the cars at the Marshall or Fox mines. The defendant did not attempt to show that the question was proper on cross-examination, that the witness was competent to answer or what he would have answered if permitted to do so. For this reason, under the two cases above cited, it cannot now be heard to insist upon this error. It is also evident that this question was simply preliminary to something which was to follow, and counsel failed to ask other questions which would tend to enlighten the Court as to what he proposed to show in case Taggart was found to possess the requisite knowledge. If Taggart had answered that he did not know, of course the defendant could not possibly complain. If he had answered that he did know, then the defendant would have been compelled to follow it up by ask-

ing him what it did cost to get out coal at these two points. Now, so far as the question related to the Fox mine it was clearly immaterial, irrelevant and incompetent. The Fox mine was the one from which Mr. Taggart secured his supply of coal which was shipped over defendant's road. As to what it cost Taggart, or the Fox company, to mine it was wholly irrelevant and immaterial. The Fox Mining Company was neither a party plaintiff nor defendant, and, so far as the record shows, in no wise interested in the event of the suit. The defendant had, therefore, no more right to inquire into the private business arrangements of the Fox company and ascertain what it cost them to get out a ton of coal than it had to investigate the private business affairs of any other person not a party to the suit. It was in no wise material to the issues of the case, and even the preliminary question, as to whether he knew the cost or not, was rightly refused. The Court, very properly, for this reason, refused to permit the witness to answer the question. No attempt was made by counsel to separate the two mines, and, by another question, to ask the witness whether he knew what it cost to get out a ton of coal at the Marshall mine. The question propounded, being a joint one as to the Marshall and Fox mines, compelled the witness to answer as to both, and so was wholly improper. If the defendant's counsel desired to ascertain what it cost the Marshall company to get out a ton of coal and put it upon the cars at Marshall, he should have asked the proper questions, of the proper witnesses and at the proper time, which would have elicited this information. Then we

might have had something before the Court for legitimate discussion, but, under the testimony as it stands, we do not conceive how there is anything upon which the Court can pass.

On the other hand, this was not legitimate cross-examination. Counsel were attempting to set up a defense through the plaintiff's witnesses. We will, however, upon this point, pass to the fifth assignment of error, which was the refusal of the Court to permit Rubidge, the Secretary of The Marshall Consolidated Coal Mining Company, which was the favored shipper, to show what it cost that company to produce a ton of coal and place it upon the cars at Marshall. Counsel for defendant argue very earnestly that this testimony should have been admitted. No authorities are cited in support of the proposition, although a number are referred to for the purpose of showing that if the Court rejects competent testimony an error is committed. We do not question these decisions; we simply say that the evidence sought to be brought forth from Mr. Rubidge was clearly inadmissible. Rubidge was the Secretary of the Marshall Company; this was the favored shipper of the defendant, and with it the so-called contract of justification was made. He was, therefore, an adverse witness to the plaintiff. Counsel for the defendant objected to most of his testimony and counsel for the plaintiff only asked him such questions as were absolutely necessary. He was only asked as to his connection with the company, the amount of coal shipped by the Marshall Company to Denver between November 1, 1885, and September 1, 1887, the rate paid thereon, the amount of rebates given to the Marshall Com-

pany, and concerning inquiries made to him in regard to such rebates. It was not legitimate cross-examination for the defendant to enquire of him concerning matters which were clearly defense, and which were not related to the matter brought out in direct. This Court, in several cases, has decided that the limit to which counsel shall be permitted to go, in cross-examining witnesses, is wholly within the discretion of the trial Court.

Philadelphia & T. R. Co. vs. Stimpson, 14 Peters, 448.

Wills vs. Russell, 100 U. S., 621.

Rea vs. Missouri, 17 Wallace, 532.

In fact, this Court was the first to lay down the rule of strict cross-examination, in contradistinction to the English rule, and its lead has been followed by nearly all the American States.

1 Greenleaf on Evidence, Sec. 445.

1 Thompson on Trials, Sec. 432.

Under these authorities this testimony was inadmissible; or, at any rate, this Court will not interfere with the discretionary powers of the trial Court, which were exercised for its exclusion. The bill of exceptions does not show the instructions given by the trial judge, what his comments upon this evidence were, and what he said with reference to the defense attempted to be set up by the defendant. If it did, this Court would be in a better position to pass upon the various questions that have been raised in regard to the evidence. Nor does the bill of exceptions set forth, or pretend to set forth, all the testimony that was introduced at the trial. The Court cannot see from the meager amount of evidence preserved by the bill

of exceptions, whether or not this refusal of the Court below was error. The plaintiff in error had abundant opportunity to introduce, or to offer to introduce, all its testimony, or at least to show what all the testimony tended to prove, and having failed to do so must abide whatever consequences legitimately arise therefrom.

Packet Company vs. Clough, 20 Wall., 528.

We think this all that is necessary to be said at this time concerning the matter. The inadmissibility of the testimony, in any event, will be fully disclosed when we consider the last assigment of errors.

Fourth. The sixth assignment of error is directed to the Court's refusal to allow in evidence the release given by the former owners of the Marshall coal mines from damages, etc.

This assignment is open to the objection already urged against the second, in that it refers to testimony rejected, without giving the full substance of the same. In addition to that the record shows that counsel, when the adverse witness, Rubidge, was on the stand, had the release identified, and then offered it in evidence as a part of his cross-examintion. As we understand the rule, defendant cannot offer documents of any sort in evidence until the close of the plaintiff's case. He can have the document identified upon cross-examination, and then, when he comes to introduce testimony for himself, it can be put in evidence if competent. Counsel, however, in this case, insisted upon the right to introduce this release as a part of his cross-examination and before the plaintiff had

rested; and, after the plaintiff had closed his case, did not again offer the same in evidence. By a failure to do this he waived his right to claim that an error was committed by the Court.

And again, it was not proper cross-examination of the witness Rubidge for the defendant was attempting to prove his own case. This point has been sufficiently discussed under the fifth assignment. The inadmissibility of the release in evidence will be seen in the general discussion of the evidence and the right of the plaintiff to recover under our next head. Nor was it in any sense proper cross-examination, for the subject had not been remotely referred to on the direct.

Fifth—The last error assigned is as follows: The Court erred in refusing to grant a new trial and in entering judgment on the verdict, because there was no sufficient evidence to support the verdict, and especially to sustain it as to the amount of damages found by it.

This assignment comes clearly within the criticism of the Court in 142 U. S. It is indefinite and uncertain. In the first place, it alleges error by the Court in overruling a motion for a new trial. This Court has repeatedly held that the granting or refusing a motion for a new trial rests in the sound discretion of the trial Court, and its action will not be disturbed.

Henderson vs. Moore, 5 Cranch, 11.
Newcomb vs. Wood, 97 U. S., 581.
Wilson vs. Everett, 139 U. S., 616.
Clyde Mattox vs. U. S., 146 U. S., 140.

So that this part of the assignment of error in our judgment needs no further consideration.

Turning to the balance of the assignment, the question at once arises as to whether or not this Court can consider it for the reason that the motion for a new trial filed in the case, which in common law actions is necessary to enable the Court to pass upon errors committed during the trial, was not in accordance with the statute, and so must be disregarded in any event. The motion was not drawn or filed in accordance with the requirements of the Colorado Code of Civil Procedure, Sec. 217, Session Laws, 1887, p. 163. It is held under similar statutes that objections to a verdict or judgment on account of the insufficiency of the evidence must set forth the substance of the evidence, or the part that is objected to.

2 Thompson on Trials, Sec. 2756.

Pico vs. Cohn, 67 Cal., 258.

And, again, we do not think the Court can pass upon the sufficiency of the evidence to sustain the verdict of the jury, because the bill of exceptions does not purport to contain all the evidence that was introduced at the trial. The bill of exceptions starts out in the usual form, to wit, that the plaintiff gave certain testimony tending to show certain facts; that such and such witnesses were sworn and gave such and such testimony. After going over a number of witnesses in this fashion, it proceeds as follows: "The case was thereupon submitted to the jury. The jury having returned a verdict for the plaintiff in the sum of $9,437.50, defendant filed its motion for a new trial in words and figures as follows, to wit: " * * * That on

the——day of————————, 1889, the Court overruled said motion, to which ruling of the Court the defendant, by its counsel, then and there excepted." (Transcript of the record, p. 46).

There is no language from which the inference could be drawn that all or even any considerable portion of the evidence is contained in the bill.

It has been decided too many times to admit of argument that under these circumstances the Court is not at liberty to presume that all the evidence has been embodied in the bill.

2 Thompson on Trials, 2783.

It has also been decided many times that unless the bill of exceptions does show that it contains all the evidence adduced at the trial a reviewing Court cannot pass upon its sufficiency. We have here a bill of exceptions showing but a part of the testimony and none of the instructions of the Court, which would have thrown much light upon the propositions discussed and enabled this Court to determine just how the jury was charged as to its duty in the premises. The bill failing to set forth the instructions, must we not assume that they were given correctly and that the jury was properly informed as to the weight of testimony and the construction which should be given to each and every part of it? Under such circumstances it would seem as though neither Court nor counsel could intelligently enter upon a discussion of the merits of the case. But, out of abundant caution for the interests of our client, we desire to briefly call attention to its salient features as disclosed by the pleadings and such testimony as has been preserved.

The action is brought under a statute passed by the Legislature of Colorado in 1885, which was enacted presumably to give effect to certain provisions of the State Constitution. It is also founded on the common law. There were four counts in the complaint, the substance of the charges being that the plaintiff was a coal merchant residing in the City of Denver and buying his coal at a mine located upon the defendant railroad some twenty or thirty miles from Denver and known as the Fox mine. In 1885 the railroad company established a certain uniform rate for all coal dealers in this district, termed that of Northern Colorado, which embraced a large number of mines situated within twenty to fifty miles of the City of Denver in order that all might transport their coal to Denver at the same terms and be placed upon the same footing. This rate was $1 per ton. Instead, however, of adhering to this rate, the company at about the same time or shortly afterwards entered into a special contract with the Marshall Coal Company, by which the latter was to pay the uniform rate of $1, and was to receive back 40 cents per ton, so that the net charge would only amount to 60 cents per ton. The mines of the Marshall company are situated about a mile or two from those of the Fox company, the haul for their coal, as a matter of fact, being a trifle longer. The rebate was given the Marshall company in accordance with this contract until sometime in the year 1887. The plaintiff averred that he was ignorant of these facts until the summer of 1887; that as soon as he discovered them he demanded a return from the railroad company of 40 cents per ton for

each ton of coal that had been carried by the company for him during the time these rebates had been paid to the Marshall company. The com pany refused, and in addition to these actual damages he demanded the statutory penalty of three times that amount.

Counsel for plaintiff in error urge very earnestly that the complaint does not state facts sufficient to constitute a cause of action, and this is the first proposition raised by them which touches upon the merits of the case. In regard to that it is sufficient to say, for the present, that the defendant company answered the complaint by a general denial, and a trial was had upon the pleadings thus formed. It is uniformly held under these circumstances that there must be an apparent and absolute failure of a cause of action to justify the Court in dismissing the suit, and more especially when the matter is first raised in the appellate tribunal. A demurrer was filed to the complaint and, after argument, was overruled. The demurrer itself does not appear in the record and so we are not at liberty to state just what defects it called to the attention of the Court; but we maintain that the complaint is amply sufficient to support the judgment in any event. It shows an unjust and unreasonable discrimination upon its face, for which the defendant is clearly liable. The authorities to which we will presently call the attention of the Court will amply sustain us in this proposition.

The next error upon which the defendant insists most strenuously is that the second defense of the answer is good. This defense in substance was that the defendant company, in consideration

of certain benefits which it received from the Marshall company, made this rebate. The rebate, however, was conditional upon the shipment by the Marshall company of two hundred thousand tons of coal per year. A contract of this kind should be construed most strictly. If valid at all, the railroad company, to shield itself behind its terms, must show a rigid compliance with them all. The answer of the defendant did not attempt to show any such compliance. The clause of the contract to which we desire to call attention is as follows: "It is further stipulated and agreed that the said Union Pacific Railway company shall give to The Marshall Consolidated Coal Mining Company *for the transportation of coal mined from above mines over the Union Pacific Railway, its branches and connections,* FROM SAID MINE TO DENVER, *the regular tariff rate not exceeding one dollar per ton unless two hundred thousand tons shall be mined and furnished for transportation from said Marshall Consolidated Coal Mining Company's mines in Colorado and transported over said railway company's lines yearly, in which case the rate of sixty cents per ton shall be given* for all coal transported. Provided that in case the tariff rate shall be reduced by said railway company below one dollar per ton during the period of this reduction the rate to said coal company shall be reduced in like ratio." Transcript of the Record, page 25, fol. 45.

The answer does not anywhere state that the conditions under which this rebate was to be given ever arose—that is, *there is no allegation that The Marshall Consolidated Coal Mining Company in any one year ever shipped two hundred thousand tons of*

coal over the defendant company's lines. The want of such an allegation is clearly fatal to the contract as a defense and to the answer. It is evident from the answer that the rebate was given upon several considerations: the supplying of the Union Pacific with coal at cost; the dismissal of certain actions supposed to be against the Union Pacific, and the shipping over its lines, from the mines to Denver, the large quantity of two hundred thousand tons per year. Admitting that a rebate could be given for these reasons, it is evident that all of the conditions must be complied with and the railroad company have received the full benefit therefrom before it can shield itself behind a contract based thereon as against the claims of other customers shipping coal under the same circumstances and conditions. Where a contract is conditional, the condition must be pleaded in order to make it available as a cause of complaint, or, what is the same thing, as affirmative matter in defense. This proposition has been too often decided to admit of much controversy. Mr. Chitty sets forth the rule as follows:

"If the defendant's promise or engagement, whether it be verbal, in writing or under seal, embody or contain *as a part of it* an *exception* or *proviso* which *qualifies* his liability, or, in certain instances, renders him altogether irresponsible, so that he was not *in law absolutely* bound, the declaration must notice the exception or proviso, or it will be a fatal misstatement."

1 Chitty on Pleading, p. 310.

See, also—

1 Greenleaf on Evidence, Sec. 58 (14 Am. Ed.), and cases cited in note 3.

Hotham vs. East India Co., 1 Term Rep., 640.

Tempany vs. Burnand, 4 Camp., 21.

Penney vs. Porter, 2 East, 2.

Latham vs. Rutby, 2 B. & C., 9.

Strong vs. Rule, 3 Bing., 315.

Stanwood vs. Scone, 4 Pick., 422.

Whittaker vs. Smith, 4 Pick., 83.

Lower vs. Winters, 7 Cowen, 263.

Waite vs. Morris, 6 Wend., 304.

Railroad Company vs. Robeson, 5 Iredell (Law), 391.

Johnson vs. Moss. 45 Cal., 515.

Kroll vs. TenEycke, 48 Mich., 230.

The same principle has been announced and followed by the Supreme Court of Colorado under the Code adopted in that State. Mr. Justice Helm states the rule in the following language:

"The conditions in the agreement above set forth are mutual and dependent, and before either party can enforce the contract, or rescind the same and recover damages for advance payments, it is necessary for him to allege and prove a compliance on his part with the conditions thereof, or facts which will excuse him from such compliance. The right to recover back the $1,000 advanced is made by the terms of the contract, dependent upon the deposit of the balance of the purchase money, as well upon plaintiff's failure to place the deed in escrow; and defendant must be able to plead and prove such deposit, or conduct on the

part of the plaintiff which will excuse him from making the same, before he is in a position to bring his action and recover the amount of his advancement."

Webb vs. Smith, 6 Colo., 365.

And so, in this case, the railroad company, to avail itself of the contract set up in its answer as a defense, must allege a compliance on the part of the coal company and itself of the terms thereof before it can hope to have the same regarded as a legitimate defense to the action of the plaintiff. This, in the answer filed, it wholly failed and neglected to do. The Court, for this reason, if for no other, was clearly right in sustaining the demurrer to the answer.

Let us now turn to the evidence as a whole and the plaintiff's right to recover thereunder. The facts in the case may be briefly summed up as follows:

1st. That the plaintiff, The Marshall Consolidated Coal Mining Company, and at least three or four other companies, were engaged, during the years 1885–87, in the business of shipping coal from various points in northern Colorado along the line of the defendant's railroad to the city of Denver.

2d. That in the year 1885 the defendant, under the statute of that year, made a schedule rate, which was in the nature of a contract between all the various companies so shipping coal from northern Colorado, by which it was to receive, and they were to pay, one dollar per ton on every ton of coal shipped from their respective mines to the city of Denver, irrespective of the question of difference in actual distance, all of said mines being

approximately within fifty miles of the city of Denver.

3rd. That all the companies, except The Marshall Consolidated Coal Mining Company, continued to ship and pay the rate of one dollar per ton until sometime in the year 1887.

4th. That in 1885, shortly after the rate of one dollar was agreed on, the defendant and The Mashall Consolidated Coal Mining Company entered into a five year contract by which the defendant, in consideration of the Marshall Coal Company shipping at least two hundred thousand tons of coal per year to Denver, getting a release from the owners of the mine for a certain claim of damages against another railway company which had formerly owned a part of the line then being operated by the defendant company, and agreeing to furnish the defendant company coal at cost, agreed to permit The Marshall Consolidated Coal Mining Company to ship its coal to Denver at sixty cents per ton, instead of one dollar, provided it shipped 200,000 tons of coal from its mines to Denver yearly.

5th. The Marshall Consolidated Coal Mining Company from that time on continued to pay the defendant company at the rate of one dollar per ton and the defendant company paid back to the Marshall company forty cents per ton for each and every ton shipped, regardless of the amount shipped in any one year.

6th. This contract and the actual amount paid to the Marshall company for its freight was kept a secret from all others shipping coal, notwithstanding several inquiries were made both of

the Marshall company and of the defendant company by the plaintiff and other competitors of the Marshall company.

7th. *In no single year nor during the life of the contract did the Marshall company ever ship two hundred thousand tons of coal over the defendant company's railroad lines either to Denver or elsewhere in the State of Colorado.* On the contrary the entire amount of coal which the Marshall company shipped during the twenty-one months from November 1, 1885, to August 1, 1887, inclusive, *to all points, including Denver*, was only 162,037 tons, or 81,164 tons per annum. During the same period of time the Denver deliveries amounted to 67,863 tons only (testimony of Rubidge, fol. 74). *Yet the Marshall company received rebates on this 67,863 tons to the amount of $27,145.33, notwithstanding the payment thereof was expressly conditional upon the shipment to Denver of not less than 200,000 tons annually.* Does not this circumstance show beyond cavil that the contract was a mere blind, the intention being to give the Marshall company the benefit of the forty-cent rebate whether it shipped much or little? If this is not so, then the fact that the railway company paid the Marshall company more than $1.25 per ton for coal furnished to it and allowed it a rebate on what coal it shipped to Denver without reference to quantity demonstrates that the dealings between the railway and the Marshall companies were not under the contract at all, but independent of it, and therefore directly obnoxious to the prohibitions of Section 7 of the Colorado railway act of 1885. Just here it may be proper to remark also that the act referred to was approved April 6, 1885, and the

contract with the Marshall company made on October 1, 1885, was necessarily obnoxious to its provisions, and for that reason as well as the others already given, unavailing as a defense to this action.

8th. The Marshall company, instead of furnishing the defendant company coal at cost, and in no event to exceed $1.25 per ton for coal for its own use, and $1.40 for coal for commercial use in Kansas, received as a matter of fact from the defendant company as high as $1.75 and $1.60 per ton for coal so furnished.

9th. In the summer of 1887 the Pacific Railway Commission held certain public sittings in the City of Denver, at which the conduct of the Union Pacific in its Colorado lines was investigated and during these investigations the contract between the Union Pacific and The Marshall Consolidated Coal Mining Company was made public, and shortly afterwards came to the knowledge of the plaintiff and other competitors of the Marshall Company in Colorado.

10th. As a result of that investigation and the contract being made public, Mr. Potter, then Vice-President of the Union Pacific, summarily canceled the contract, notwithstanding it had three years of life, and compelled the Marshall Company thereafter to pay the regular rate of one dollar per ton on its coal shipped to Denver.

11th. The plaintiff in this suit, as soon as he came into knowledge of the fact of said contract being in existence, demanded of the President of The Union Pacific Railway Company that they repay him the amount of extra charges to which he

had been subjected while said contract was in force, and the officers of The Union Pacific Railway Company refused to accede to that demand and claimed that there was no unjust discrimination in favor of the Marshall Company and against other competitors, by virtue of that contract.

12. During the existence of the contract the plaintiff lost the sale of a good many cars of coal and his business was not as profitable as it would have been if said contract had not been in existence.

Under the above facts and the Constitution and laws of the State of Colorado, was the plaintiff in this suit entitled to recover the amount of the judgment which had been entered in his favor? But one answer, in our opinion, can be made to this question. The constitutional provision of Colorado is in the following language:

"All individuals, associations and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the State, and no railroad company, nor any lessee, manager or employe thereof shall give any preference to individuals, associations or corporations in furnishing cars or motive power."

Constitution of Colorado, Sec. 15, Art. VI.

The legislative provisions are as follows:

"Sec. 7. (Unlawful discrimination.) No railroad corporation shall, without the written approval of said Commissioner, charge, demand or receive from any person, company or corporation, for the transportation of persons or property, or

for any other service, a greater sum than it shall, while operating under the classification and schedule then in force, charge, demand or receive from any other person, company or corporation for a like service from the same place, or upon like conditions and under similar circumstances, and all concessions of rates, drawbacks and contracts for special rates shall be opened to and allowed all persons, companies and corporations alike, at the same rate per ton per mile, upon like conditions and under similar circumstances, except in special cases designed to promote the development of the resources of this State, when the approval of said Commissioner shall be obtained in writing."

"Sec. 8. (Extortion.) No railroad corporation shall charge, demand or receive from any person, company or corporation an unreasonable price for the transportation of persons or property, or for the handling or storing of freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad corporation, and not specified in the classification and schedule prepared and published by such railroad corporation. The superintendent or other chief executive officer of each railroad in this State shall cause to be kept posted up, in a conspicuous place in the passenger depot in each station where passenger tickets are kept for sale, a printed copy of the classification and schedule of rates of freight charges then in force on each railroad, for the use of the patrons of the road. Any railroad company violating any of the provisions of this section shall be deemed guilty of extortion, and be subject to the penalties hereinafter described."

"Sec. 9. (Penalty.) Any railroad corporation that shall violate any of the provisions of this act as to loading points, freight-cars, unjust discrimination, or extortion, shall forfeit, in every such case, to the person, company or corporation aggrieved thereby, three times the actual damage sustained or overcharges paid by the party aggrieved, which triple damage shall be adjudged

to be paid, together with the costs of suit and a reasonable attorney's fee, to be fixed by the Court and taxed with the costs."

Session Laws of Colo., 1885, pp. 309–10.

These sections are substantially the same as the common law rule and the statutes enacted by Parliament in 1845 and 1854 and by Congress in 1887. This Court and the Supreme Court of Colorado has declared that the constitutional provision is but declaratory of the common law.

Atchison, Topeka and Santa Fe R. R. Co. vs. the Denver and New Orleans R. R., 110 U. S., 667.

Bayles vs. Kansas Pacific Ry. Co., 13 Colo., 181.

No decision either by this Court or by the Supreme Court of this State, upon the point in controversy here has ever been made. We are, therefore, left to deduce conclusions from the reasoning employed in the cases above cited, and to see what the common law of England and the American rule under similar statutes has been. There can be no question, in our judgment, but that these constitutional and statutory provisions amount practically to the same thing as the English Railway Acts of 1845 and 1854. If there is any difference it would be against the railway company; that is, our statute is more strict and stringent than are the Acts of Parliament. Circuit Judge Jackson, in as well considered an opinion as was ever delivered from any bench has held the Inter-State Commerce Act to be practically the

same as the Acts of Parliament above referred to.

Inter-State Commerce Com. vs. B. & O. R. R. Co., 43 Fed. Rep., 37.

There can be no doubt that the object and purpose of the Colorado enactments, both constitutional and legislative, were to effect the same result as those for which the Acts of Parliament and the Inter-State Commerce Act were designed. The language concerning discrimination and extortion is practically the same in all three cases. In the case just referred to, decided by Mr. Justice Jackson, it was held that, having adopted the principles of the English Acts, we adopted with them the construction placed upon those acts by the English Courts. This rule has received the repeated sanction of this Court.

McDonald vs. Hovey, 110 U. S., 619.

It follows then, if we can find in cases, which have passed upon the English Acts, statements of fact, analogous to those disclosed in this case, such decisions should be respected by this Court. A number of cases decided by the ultimate tribunal of that country, the House of Lords, are to be found, which carry the rule much further than is necessary to sustain the judgment in this case.

The first important case, to reach the House of Lords, was that of The Great Western Railway Company vs. Sutton, decided in 1868. Mr. Sutton was a carrier, with places of business in London, Bristol and the west of England. He was engaged in what would be practically termed in this country the express business. The railroad company had a schedule of rates for packages between London and Bath, graduated according to the number of

pounds in each parcel. It had a rule that if a large number of parcels were done up in one package it should not be treated as one parcel. If it should be treated as one parcel, the rate would be 42–6d. If it was treated as a number of parcels, this was increased one-half. The railroad company received numbers of parcels from Mr. Sutton done up in this manner and charged him the extra one-half rate; at the same time, for carrying parcels, under the same circumstances, for other firms, and which, it knew, were done up in the same way, it only charged the regular rate, as though but one parcel was being shipped. Mr. Sutton, in 1861, sent a parcel to the company done up in this manner, and paid the extra one-half rate, and immediately after brought suit to recover back the extra amount, making this one parcel a test case. The matter was litigated from that time until 1869 when it was finally passed upon by the House of Lords. The Attorney General appeared for the defendant company and made the principal argument in the House of Lords. In the course of his argument he urged the following proposition:

"If all the customers of the Defendants, except one, were charged at a certain rate, but the Defendants chose to make an exception in favor of that one, no right of action would thereby arise to all the rest. The Legislature never could have intended that, under no circumstances whatever, should a company remit a part or the whole of its charges in favor of one individual, without giving to every one else a right of action against it."

He also urged that Mr. Sutton was not entitled

to recover back the amount of overcharges he had paid, in any event, as he had not suffered any damages by reason of the alleged discrimination of the defendant company. All the Judges were summoned, and the question was propounded to them, by the Lords, as to whether or not the plaintiff was entitled to recover. Mr. Justice Blackburn delivered the opinion of the Judges, in the course of which he used this language:

"And if this be borne in mind, I think the construction of the proviso for equality is clear, and is, that the Defendants may, subject to the limitations in their special Acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances. And I think it follows from this that if the Defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute, extortionate. And I think that the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies acting as carriers on their lines must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the Common Law on ordinary carriers as being more than was reasonable.

"The mode of establishing that the demand is extortionate differs in the two cases. Where it is sought to prove that the charge is unreasonable, and therefore extortionate, the fact that another was charged less is only material as evidence for the jury tending to prove that the reasonable charge was the smaller one. When it is sought to

show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not, it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances. One single act of charging a person less on one particular occasion would not, I think, make the higher charge to all others extortionate during all that day, or week, or month, or whatever the period might be. I think it would be necessary to show that there was a practice of carrying for some person or class of persons at the lower rate."

All the Judges, with the exception of Baron Bramwell, concurred in the judgment of Mr. Justice Blackburn; and Baron Bramwell only dissented upon the ground that the evidence, in his judgment, was not sufficient to show that the railroad company knew that the packages coming from other sources than Mr. Sutton were of a similar character to those shipped by him. The Lords, after taking some time to consider the case, unanimously adopted the reasoning of the Judges and affirmed the judgment of the Exchequer Chamber, giving the plaintiff his damages.

The Great Western Ry. Co. vs. Sutton.
Law Reports, 4th House of Lords, 226.

Probably no better considered case was ever decided in any tribunal. But one Judge in England (Lord Chief Justice Erle) was found to dissent from the reasoning upon which judgment was pronounced.

The reasoning of Mr. Justice Blackburn, above stated, affords an admirable answer to that employed by counsel for plaintiff in error. The burden of his argument against the right of the plaintiff to recover is that he has failed to show that the rates charged him were unreasonable. Section 7, above cited, is the same as what Mr. Justice Blackburn terms the equality clause in the English statute, in that it requires a railroad company to charge the same price to all persons for the same service; and an examination of the English statute will show that the wording is almost identical with that of Colorado. As Mr. Justice Blackburn says, under that clause a case is made out, no matter whether the rate is reasonable or not, just as soon as it is shown that for the same or similar services a defendant company charges one person more than it does another. This case reviews every English authority which had been decided up to that time and may be taken by us as the starting point of the English decisions. The argument used by the Attorney General, as quoted above, has much the same ring to it as that used by the learned counsel for plaintiff in error in this case.

The next important case determined by the House of Lords, was of the London & Northwestern Ry. Co. vs. Evershed, decided in 1878. That case was also elaborately considered by the Queen's Bench Division and by the Court of Appeal before it reached the House of Lords. The three Courts were unanimous in giving the plaintiff a right of action. The facts are well stated in the syllabus as follows:

"E. was a brewer at the town of B., where three railways had their stations. With one of these railways, M., certain brewers in the town had direct communication by sidings, which enabled goods to be sent to the trains, and taken from the trains of Railway M. with greater ease and less loss of time than by the way of ordinary cartage. M. charged them nothing for cartage, and made a rebate in the charge for station to station conveyance. These brewers had no such communications with Railway N. W., but it was often convenient for them to send by that railway; and the directors of that railway, in order to compete with Railway M., allowed these particular brewers the same advantages as to cartage and rebate as Railway M. did. As to all others in the same trade (E. among the rest), the directors of Railway N. W. made the ordinary charge for cartage, and allowed no rebate on the charge for conveyance on the line—Held. That this was an inequality and an undue preference within the meaning of the statutes."

The case was decided by the House of Lords without calling upon attorneys for the respondent, who was the plaintiff below, to respond to the argument of counsel for the appellant, Lords Blackburn and Cairns giving very forcible reasons why the judgment of the Court of Appeal should be affirmed.

London & N. W. Ry. Co. vs. Evershed, Law Rep., 3 App. Cases, 1029.

The next important case was that of Denaby Main Colliery Co. vs. Manchester, etc., R. R. Co., decided in 1885. An arrangement between a number of coal mines and the railroad company,

similar to that between the Union Pacific and the mines of Northern Colorado had been entered into. A number of collieries situated at different points along the line of the railroad company was allowed the same rate for transporting coal to market; and it was held that, on the complaint of the colliery nearest the destination, that the railroad company had a right to make an arrangement of that kind. But it was also held that where one of the collieries was allowed a rebate upon shipments to a certain port which was not allowed to the other collieries, that this was an unjust discrimination. The decision is interesting in that the Earl of Selborne expressed himself very forcibly upon the proposition of the illegal discrimination and the ascertainment of the amount of damages to which the party discriminated against was entitled to recover. Upon the last point he said: "It being known how much coal was actually carried at the reduced rate for Bannister during these periods, it seems to me to result from the principle established in the cases of Sutton, and Evershed, that the appellants ought to have been charged at the same reduced rates up to, but not beyond, the same total quantity during the same period of time, and that this is the true measure of the overcharge, for which the arbitrator ought to give them credit." The statement of facts found by the referee for which the company was held liable on the charge of discrimination, was as follows: "Between July 1874, and March, 1880, the plaintiffs allowed to Bannister 6d per ton on all coal shipped by him from Grimsby to English ports south of Harwich. The circumstances under

which this allowance was made are as follows. There was little trade of this kind, and Bannister undertook to develop the trade, to provide vessels, and to run the risks incidental to the working of such a traffic, and, in consideration of his doing so and in view of the anticipated advantage to the company by the increased tonnage to be carried over their line, the plaintiffs agreeed to give him 6d per ton upon the number of tons shipped. This was equivalent in amount to an allowance of 6d per ton upon the carriage account in respect of the coals in question. But I find that the arrangement was *bona fide* of the description above given, and, whether legitimate or not, was not made with the object of giving a preferential rate of carriage to Bannister. In the company's books the sums due were credited every quarter of a year to Bannister under the description of 'agency commission for shipments of coal by coast-wise vessel to ports south of Harwich.' No opportunity was afforded to the public in general, or to other persons sending coal by the plaintiff's railway to Grimsby, of earning the like payment by the like services." The Earl of Selborne says upon this state of facts, "I cannot think that the circumstances under which the 6d per ton was allowed as stated in paragraph 13 of the special case, ought to make any difference. All these coals are proved to have been carried 'only over the same portion of the line, and under the same circumstances' as the appellant's coal. The motives and reasons for making these allowances are plainly not material,

as against the appellant's claim to have their coals carried on the same terms."

Denaby Main Colliery Co. vs. Manchester &c. R. R. Co., Law Reports 11 App. Cases, 97.

The last quotation affords a fit answer to the argument of the plaintiff in error that, if the consideration for making the contract relied on as a defense in this case, was satisfactory to the defendant company, the plaintiff could not complain. The Court below, in its opinion upon the demurrer, used language practically the same as that above.

The words of the Court were:

"The whole answer amounts only to this: that the Marshall company is allowed less rates than other shippers are required to pay upon considerations which are satisfactory to defendant; and it is obvious that this is no answer to a complaint of unlawful discrimination."

Trans. Goodridge case, p. 31, fol. 55.

This is much the same as the Earl of Selborne's statement that the motives and reasons for making the allowance are plainly not material.

We presume that counsel for the railroad company in that case used the same arguments that have been used here; that where the favored shipper took certain risks, for the purpose of building up a certain trade, and agreed to furnish his own vessels with which to carry his coal that this was a valuable consideration paid by the shipper and the amount of the same was not material to parties who were thus discriminated against. The House of Lords, however, were unanimously of the opinion

that this was not in accordance with the spirit of the English statute.

The last English case to which we desire to call attention was one decided in 1892, in which the principles of the cases just cited were re-affirmed and re-announced by such eminent common law authorities as Lord Justice Lindley and Chancellor Herschell.

Phipps vs. London & N. W. Ry. Co., Law Reports 2 Q. B., 229.

Also reported—

50 American and English R. R. Cases, 494.

The only point in that case to which we desire to call any special attention is that it was announced and made the basis of the decision that unjust discrimination was a question of fact and not of law. These four English cases contain reference to every common law authority and amply sustain a right of action under the statement of facts disclosed by the evidence here. Three of them decide distinctly that a plaintiff in such cases has a right to recover the amount of overcharges which he has paid; and if he shows that he has paid overcharges this is *per se* damage to him, and he has an action on the case for money had and received to recover them back. Beyond this we do not desire to go in the present case.

The Legislature of Colorado has adopted these decisions by enacting a statute which contains the same rules as those enacted by Parliament, and the only authoritative decision by the Supreme Court of the State is in entire accord therewith. In the case of Bayles vs. The Kansas Pac. Ry. Co., while it was held that mere in-

equality of rates does not amount to an unjust discrimination, the Court, in its opinion, gives the test by which we may determine what inequality does amount to an unjust discrimination, and it is far beyond the facts of this case. Mr. Commissioner Pattison said:

"Whether the rate was either different or less than that given to other shippers residing in Denver, under like conditions and under the same circumstances, does not appear. It does not appear, either directly or indirectly, that the special rate given to plaintiff was an exclusive privilege enjoyed by him alone. There is nothing to warrant the inference that any shipper residing in Denver could not have secured the same rate upon property which was to be shipped by him from Eastern cities. There is nothing in the complaint showing that any shipper, whether he desired to ship much or little, might not have secured the same rate upon application to appellee. Neither is there anything to warrant the assumption that the arrangement was a secret one. Neither is there any reason for the inference that it was the intention of the railway company to give to appellant a preference. There was no promise not to give the same rate to others. The railway company remained at liberty to charge others the same or lower rates."

Bayles vs. Kansas Pac. Ry. Co., 13 Colo., 181.

Taking the position here announced and applying it to the facts in this case we find that the rate given to the Marshall company was an exclusive privilege, that no other competitor was permitted

to have it; that it was secret, and that it was the intention of the defendant company to give the Marshall company a preference. All of the facts which took the Bayles case out of the statute are present to bring this within it. The opinion of Mr. Commissioner Pattison is a very able one, and reviews most of the American authorities, and the result there announced amply sustains our position.

The language of this Court in the Santa Fe case is clearly in accord with the above authorities. Chief Justice Waite, there says:

"It may be that the local rates to and from Pueblo are too high, and that they ought to be reduced, but that is an entirely different question from a division of through rates. There is no complaint of a discrimination against the Denver and New Orleans Company in respect to the regular Pueblo rates; neither is there anything except the through rates to show that the local rates are too high. The bill does not seek to reduce the local rates, but only to get this company put into the same position as the Denver and Rio Grande on a division of through rates. This cannot be done until it is shown that the relative situations of the two companies with the Atchison, Topeka and Santa Fe, both as to the kind of service and as to the conditions under which it is performed, are substantially the same, so that what is reasonable for one must necessarily be reasonable for the other."

A. T. & S. F. Railroad vs. D. & N. O. Railroad, 110 U. S., 667.

The effect of these words is that, under the

common law and the constitution of Colorado, where the kind of service and the conditions under which it is to be performed are the same, a rate which is reasonable for one shipper must necessarily be reasonable for others. Followed to its logical conclusion, it must result in holding that if sixty cents is a reasonable rate for the Marshall Coal Company it is necessarily a reasonable rate for the plaintiff in this suit, and anything beyond that is unreasonable and extortionate.

Several of the justices of this Court have, upon the circuit, expressed themselves in yet stronger terms.

The well known views of the late Justice Miller need scarcely be called to the attention of the Court. They are remembered by every member of the bar and the Judge of every Court who has dealt with the question since they were uttered. While this Court reversed the judgment it did not trench upon, but rather confirmed the general views held by that eminent jurist.

Southern Express Company vs. St. L. I. M. & S. Rd. Co., 10 Fed. Rep., 210.

Express Cases, 117 U. S., 1.

The elaborate opinion of Mr. Justice Jackson while Circuit Judge of the Sixth Circuit, has already been referred to. No criticism can be made on the language used or the result announced. Both are in accord with the principles for which we are contending.

Interstate Commerce Com. vs. B. & O. Rd. Co.; 43 Fed. Rep., 37.

Mr. Justice Brewer, while Circuit Judge of the Eighth Circuit, passed upon a case whose facts

were closely analagous to these. A railroad company had given a coal company rebates under a contract of about equal validity with the one at bar. In holding the contract to be clearly illegal, Judge Brewer said:

"It needs but little reflection to see that such a contract as this, in its necessary result, would tend to build up a monopoly on behalf of the fuel company, and that that was its purpose was evident. If it could succeed in making similar transportation contracts with other transportation companies, running to other coal fields, it would soon be in a position where it would be absolute master of the coal business of this northwestern country. It would have the monopoly of that business, and, when once that monopoly was secured, it could dictate prices to the consumers, and could dictate starvation wages to the producers in the coal fields; and finally, when the first contracts had expired, it could dictate transportation rates to the railroad companies. And having thus, by these various contracts, reached out to the various coal fields, and become master of the business, it would build up just such a monopoly, and by just such contracts, as the Standard Oil Company has built up in this country, to the great detriment of all."

Burlington, C. R. & N. Ry. Co. vs. Northwestern Fuel Co., 31 Fed. Rep., 652.

In the case of Dinsmore vs. Railway Company, decided in 1880, where Mr. Justice Matthews, then at the bar, represented the plaintiffs, Judge Baxter, in a well considered opinion, held railroad companies to a very strict account in the matter of

equal accommodations to their patrons. At one point, this forcible language is used:

"And next in importance to this leading idea is the obligation to do exact and even-handed justice to everybody offering to do business with them. If direlict in the performance of anyone of the obligations imposed by law, they may be quickened thereto by the mandatory power of the Courts, or compelled to surrender their franchise, which they thus refuse or neglect to exercise in the spirit of their several charters."

At the close of his opinion he stated that these views were also held by all the district and circuit judges with whom he had consulted and by Justices Woods, Harlan and Swayne of this Court.

Dinsmore vs. Railroad Co., 2 Fed. Rep., 465.

Mr. Justice Field concurred with Mr. Justice Miller in his dissenting opinion in the "Express Cases," 117 U. S., 1.

There are several other federal decisions bearing upon this question to which we might call attention.

Hays vs. Pa. Co., 12 Fed. Rep., 309.

Menacho vs. Ward, 27 Id., 529.

Samuels vs. L. & N. Rd. Co., 31 Id., 57.

The Interstate Commerce Commission has also rendered some important decisions enforcing the same principles. Rates must be reasonable and just and no discrimination shown as between communities and persons where the circumstances and conditions are the same.

Farmington Board of Trade vs. Rd. Co., 1. I. C. C. Rep., 215.

Raymond vs. Railroad Co., 1 I. C. C. Rep., 230.

Crews vs. Railroad Co., 1, I. C. C. Rep., 401.

In re. Produce Exchange of Toledo, 2 I. C. C. Rep., 588.

Murphy vs. Wabash Rd. Co., 5 I. C. C. Rep., 122.

Refiners Association vs. Railroad Co., 5 I. C. C. Rep., 415.

We might close this brief with these authorities, but the various American State Reports are filled with a large number of cases which will illustrate the common law and statutory rule. We here refer generally to the following list of authorities which contain the important decisions and refers practically to all others:

Scofield vs. Railroad Co., 43 Ohio St., 571.

McDuffee vs. P. & R. Rd. Co., 52 N.H., 430.

New England Express Co. vs. Maine Central Rd. Co., 57 Me., 188.

Messenger vs. Pa. Rd. Co., 37 N. J. L., 531.

Rogan vs. Aiken, 9 Lea., 609.

Railroad Co. vs. Rust, 58 Texas, 98.

Audenried vs. Pa. Rd. Co., 68 Pa. St., 370.

Johnson vs. Railroad Co., 16 Fla., 623.

Ex parte Benson, 18 S. C., 38.

C. & A. Rd. Co. vs. People, 67 Ill., 11.

Railway Co. vs. Rinard, 46 Ind., 293.

Root vs. Long Island Rd. Co., 114 N. Y., 300.

Du Laurans vs. Rd. Co., 15 Minn., 29.

Rothschild vs. Wabash Rd. Co., 15 Mo. App., 242.

Railroad Co. vs. Ervin, 118 Ill.. 250.
Hines vs. Rd. Co., 95 N. C., 434.

From this array of authorities we desire to call the Court's attention to the facts of one or two.

The case of Cook vs. The Chicago, Rock Island and Pac. R. R. Co., decided by the Supreme Court of Iowa, contains a complete answer to all of the arguments of counsel for the plaintiff in error as to the sufficiency of our complaint and the evidence to sustain the judgment. The syllabus, as prepared by the editor of the American and English Railroad Cases upon this point, is as follows:

"The fact that the charge of a common carrier is less for one shipper than another is only evidence to show that a particular charge is unreasonable. In an action by a shipper against a common carrier to recover alleged overcharges the plaintiff averred that the rate charged him was unreasonable and is and was an unjust discrimination. Held, that it could not be said that the petition did not charge as a substantial fact that the rate charged the plaintiff was unreasonable, nor could it be said that the action was founded solely upon the fact of a mere difference in rates. The payment by a common carrier secretly of a rebate to certain shippers constitutes an unjust discrimination against others shipping the same class of goods under the same conditions at the regular rates and is illegal at common law. In an action by a shipper to recover overcharges from a common carrier based upon the payment of rebates to rival shippers, the only finding that can in any fairness be made is that after deducting the rebate, the rate charged the other

shippers was reasonable and that the exaction from the plaintiff was unreasonable and the discrimination against him unjust."

Cook vs. Chicago, R. I. & Pac. Ry. Co., 81 Iowa, 551; also reported in the 45 Am. and Eng. R. R. Cases, 291.

The case of Schofield vs. The R. R. Co., 43 Ohio St., has been so often referred to, that we only call it to the attention of the Court as a valuable resume of the authorities and because the facts therin stated are somewhat analagous to those in the case at bar.

A late case decided by the Supreme Court of Ohio in which a similar contract was held illegal is instructive. The railroad company there was in failing circumstances and for the purpose of securing the large trade of an oil company entered into an agreement to give it reduced rates. This contract was declared illegal.

Brundred vs. Rice, 32 N. E. Rep., 169.

And a late case by the Supreme Court of Indiana is closely analagous to the one at bar.

There the railroad company entered into a contract with certain tie contractors to carry their ties over its road at a reduced rate in consideration of the contractors furnishing the railroad company with ties at a reduced price. Other shippers of ties brought an action to recover the amount of overcharges, and were permitted to do so, the Court holding expressly that the contract set up by the defendant was not a defense to the suit.

Louisville, etc., R. R. Co. vs. Wilson, 32 N. E. Rep., 311.

It is unnecessary, however, to cite other particular cases. The English cases and the decisions of the Supreme Court of Colorado and of this Court upon similar statutes are conclusive. The result of all the authorities is that the plaintiff was entitled to recover, and that the defense attempted to be set up by the defendant in its answer was not sufficient. It will be seen that the opinion of the Court below in sustaining the demurrer, which is set forth in the transcript of the record in the Goodrich case, is clearly in accord with adjudicated cases. The company, for considerations which it deemed sufficient to itself, saw fit to give the Marshall company a lower rate than anyone else. The same fact is to be found in every case which has been cited above. The railroad company, for some advantage to itself, some consideration moving from the favored shipper, gave him rates, and yet such a contract has always been declared void. No railroad company would give such a contract out of pure generosity.

And when we come to look at the testimony and find that the defendant offered none whatever, we might say to it, as was said by Mr. Justice Wills in the Sutton case: "I am, therefore, at a loss to see what question of amount of evidence here arises. The defendants, having the opportunity of explanation, offer none. They accept the evidence of the plaintiff as true, and unless it can be affirmed that the question of likeness is not one of fact for the jury and that it is no cause of action upon the equality clause that the defendants charged the plaintiff for

the carriage of his goods a sum larger than that which they charged at the same time to other persons in respect of goods which they knowing that they were of a like description and quantity carried along the same line under like circumstances as to risk and expense, the learned judge's direction is unexceptionable." The defendant, in this case, had an opportunity to rebut the testimony offered by the plaintiff but saw fit not to avail himself of it. In the cross-examination of the plaintiff's witnesses he brought out many of the facts which he had attempted to set up in his special answer, and it is clear that, if they were any defense to the action, it only remained for the jury, under proper instructions from the Court, to pass upon them. This was done and the Court below is presumed to have given proper instructions since the defendant has not seen fit to assign them in this Court for error. The so-called release from a claim for damages will be found, on examination of the record, to have been given for a company which, at the time the damages accrued was covered by a mortgage securing bonds for one million dollars, and that the road was afterward sold out under this mortgage, so that no claim could have remained against the property of that company for damages. The release would be a consideration for nothing: it amounted to no more than a piece of waste paper. The furnishing of coal to the defendant company at cost, it seems, was never done, and instead of charging $1.25 per ton as provided by the contract, they charged, and the defendant paid, $1.60 and $1.75.

The increased amount of traffic which the Marshall company was to furnish to the extent at least

of 200,000 tons per year was never carried out and no benefit came to the plaintiff in error by reason of that fact, so that every consideration relied upon by the defendant to show that this might possibly be a just and reasonable discrimination, when we bring it to the test of the evidence actually offered in the case, falls to the ground.

Consider for a moment the practical result to which counsel's reasoning would lead us. A wholesale shoe merchant receives some slight personal injuries in a railroad accident. He is a heavy shipper between two points connected by several competing lines of railroad. He goes to the President of the company with a demand for fifty thousand dollars for his injuries. The President says we do not think the company is liable, but if you will give us a release for all claims against the company and ship all your goods by our line we will allow you a rebate of forty per cent from the published schedule rates for the next five years. Would counsel for plaintiff in error contend that this was a valid contract as against other shippers who were thus discriminated against? Would anything be added to its validity by the merchant agreeing to furnish the President and Directors of company with shoes at cost or not to exceed four dollars per pair in any event, and to ship ten thousand tons per year?

Considerations satisfactory to the railroad company could be arranged with convenience and ease. Natural love and affection is a valid consideration between individuals. A monopoly railroad has a fraternal feeling for a kindred monopoly, such as a coal or oil company, and if counsel's

position were permitted to go unchecked we might at no distant day be confronted with a contract for rebates between two such would be monopolies, based upon natural love and affection.

The closer we examine the defense in this case the more convinced must we become that it was influenced by some such motives. As to the contract itself, the provisions are that the coal company, in consideration of the railroad company going out of the coal business and giving reduced rates, agrees to furnish the railroad company with coal at cost, and in no event to exceed $1.25 per ton. Now, does this seem an equitable arrangement on its face? The railroad company had been actively engaged in coal mining before this. Its superior position as to rates of transportation gave it such an advantage as against competing coal mines that to the ordinary mind its mere agreement to cease coal mining would be a sufficient consideration for any competing company to furnish coal for locomotives at cost. The Marshall company, when it received the actual cost for its coal, was out nothing. It was rid of its most dangerous competitor. So far, there is nothing granted by the Marshall company to justify the railroad in violating the law and giving any special privileges. The company, in consideration of its getting coal for costs, gives up what was probably a lucrative business. It must at least in its coal mining operations have made enough to secure coal for its locomotives, at a price as low as it could be produced by the Marshall company. At any rate, in its answer in this case it states that its reasons for going out of the

business were that other companies, and chiefly the Marshall, were complaining about rates, and the natural interpretation of the answer is that it concluded it was best to give up the *profits of coal mining* to gain the good will of its customers in the railroad business. So far all the consideration leans to the side of the railroad company. But we do not think it necessary to pursue the matter further. The so-called release and the agreement as to the two hundred thousand tons to be shipped annually by the Marshall company have all been gone over. The actual interpretation of the contract shows it must have been a mere pretense and fraud. Not a single provision was kept. The railroad company paid its rebate regularly, without the slightest regard to the contract, and only when it was brought to the bar of justice did it attempt to shield itself behind the terms of the repudiated agreement — twice repudiated, we may say, once in actual practice, and once by the company's own agent, when its existence was made public.

An attempted analysis of the terms of this defense shows the danger of permitting it to be entertained. If the coal company and the railroad company had got together and as a result of their differences it was found that a balance of say thirty thousand dollars was due the company this might have formed the basis of an agreement to pay it back in the shape of reduced rates. If the debt was legitimate there is no question it could be paid in this way. But the moment it was paid the regular rate must be resumed. The statute requires the company to receive the *same consideration* from all for the like service. It must, if charged